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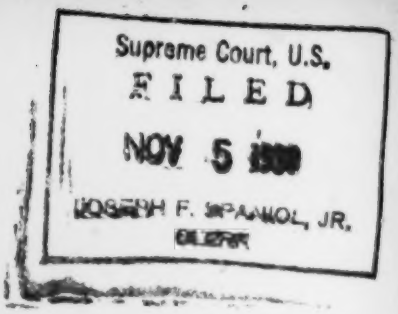


No. _____

_____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

_____

MITCHELL'S FORMAL WEAR, INC., Petitioner,

V.

KENTUCKY OAKS MALL COMPANY, Respondent.

_____

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

_____

PETITION FOR A WRIT OF CERTIORARI

_____

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## QUESTION PRESENTED

Did the Supreme Court of Ohio err in holding it constitutionally permissible for Ohio courts to assert personal jurisdiction over a nonresident Georgia corporation even though the nonresident corporations's only contacts with the State of Ohio were entering into a lease that contained a choice-of-law clause providing that Kentucky law would govern, with an Ohio limited partnership for retail space located in Kentucky, negotiating terms of the lease by telephone between Georgia and Ohio, and mailing rent checks to Ohio, as required by the lease?

## LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below were the petitioner Mitchell's Formal Wear, Inc. and the respondent Kentucky Oaks Mall Company. Mitchell's Management Corporation, a Georgia Corporation, owns one hundred percent of the stock of Mitchell's Formal Wear, Inc., a Georgia corporation. Mitchell's Formal Wear, Inc. has no other ownership interests in any other corporation.

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# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

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MITCHELL'S FORMAL WEAR, INC., Petitioner,

v.

KENTUCKY OAKS MALL COMPANY, Respondent.

---

## PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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The petitioner Mitchell's Formal Wear, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Ohio, entered in the above-entitled proceeding on August 8, 1990.

## OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported at 53 Ohio St.3d 73 (1990), and is reprinted in the appendix hereto, p. 3a, infra.

The journal entry and opinion of the Court of Appeals of Ohio, Seventh Appellate District, Mahoning County unreported. It is reprinted in the appendix hereto, p. 11a, infra.

The judgment entry of the Common Pleas Court of Mahoning County, Ohio is unreported. It is reprinted in the appendix hereto, p. 17a, infra.

## JURISDICTION

In January, 1988, the Ohio respondent brought this suit against the Georgia petitioner in the Common Pleas Court of Mahoning County, Ohio. On September 20, 1988, the court granted petitioner's motion to dismiss the complaint against it on the grounds that Ohio courts lacked in personam jurisdiction over petitioner. See p. 17a, infra.

Respondent appealed to the Ohio Court of Appeals for the Seventh Appellate District, Mahoning County, Ohio. That court affirmed the Common Pleas Court's decision on June 29, 1989. See p. 11a, infra.

Respondent then appealed to the Supreme Court of Ohio, which, on August 8, 1990, reversed and remanded the case to the trial court for further proceedings. See p. 2a, infra. No petition for rehearing was sought.

Subsequently, petitioner filed a motion for stay in the Court of Common Pleas, Mahoning County, Ohio. Respondent filed a memorandum opposing motion to stay on or about October 4, 1990. The court denied the motion to stay on October 18, 1990.

The jurisdiction of this Court to review the judgment of the Supreme Court of Ohio is invoked pursuant to 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

U.S. Const. Amend. XIV.

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Rev. Code Ann. § 2307.382 (Anderson Supp. 1989). Personal jurisdiction.

(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:

(1) Transacting any business in this state;

(2) Contracting to supply services or goods in this state;

(3) Causing tortious injury by an act or omission in this state;

(4) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

(5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when he might reasonably have expected such person to use, consume, or be affected by the goods in this state, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue form goods used or consumed or services rendered in this state;

(6) Causing tortious injury in this state to any person by an act outside this state committed with the

purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state;

(7) Causing tortious injury to any person by a criminal act, any element of which takes place in this state, which he commits or in the commission of which he is guilty of complicity;

(8) Having an interest in, using, or possessing real property in this state;

(9) Contracting to insure any person, property, or risk located within this state at the time of contracting.

(B) For purposes of this section, a person who enters into an agreement, as a principal, with a sales representative for the solicitation of orders in this state is transacting business in this state. As used in this division, "principal" and "sales representative" have the same meanings as in section 1335.11 of the Revised Code.

(C) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this section may be asserted against him.

Ohio Civ. R. 4.3. Process: out-of-state service.

(A) **When service permitted.** Service of process may be made outside of this state, as provided herein, in any action in this state, upon a person who at the time of service of process is a nonresident of this state or is a resident of this state who is absent from this state. The term "person" included an individual, his executor, administrator, or other personal representative, or a corporation, partnership, association, or any other legal or commercial entity, who, acting directly or by an agent, has caused an event to occur out of which the claim which is the subject of the complaint arose, from the person's:

(1) Transacting any business in this state;

(2) Contracting to supply services or goods in this state;

(3) Causing tortious injury by an act or omission in this state including but not limited to actions arising out of the ownership, operation, or use of a motor vehicle or

aircraft in this state;

(4) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct or derives substantial revenue from goods used or consumed or services rendered in this state;

(5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when he might reasonably have expected such person to use, consume, or be affected by the goods in this state, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue form goods used or consumed or services rendered in this state;

(6) Having an interest in, using, or possessing real property in this state;

(7) Contracting to insure any person, property, or risk located within this state at the time of contracting;

(8) Living in the marital relationship within this state notwithstanding subsequent departure from this state, as to all obligations arising for alimony, custody, child support, or property settlement, if the other party to the marital relationship continues to reside in this state;

(9) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state;

(10) Causing tortious injury to any person by a criminal act, any element of which takes place in this state, which he commits or in the commission of which he is guilty of complicity.

## STATEMENT OF THE CASE

Petitioner is a Georgia corporation which operates retail stores for the sale and rental of formal wear. All of petitioner's stores and agents are located exclusively throughout the Southeastern United States. Petitioner has never operated any stores in Ohio.[1] Respondent is an Ohio limited partnership which owns and operates the Kentucky Oaks Mall located in Paducah, Kentucky. Respondent is an entity controlled by the Cafaro Company, one of the largest developers of retail shopping malls in the United States.

In 1985, petitioner and respondent entered into a lease whereby petitioner leased from respondent unit number 640 of the Kentucky Oaks Mall. (The lease is reproduced at p. 31a, infra.) Petitioner never entered Ohio to negotiate the terms of the lease; all negotiations were conducted by telephone and mail between petitioner in Georgia and respondent in Ohio. Petitioner signed the lease in Georgia and mailed it to respondent in Ohio. Therefore, according to clause 43 of the lease (p. 71a, infra), which provides that the lease became effective upon its delivery by respondent to petitioner, the lease became effective in Georgia. Petitioner's only contacts with the State of Ohio were the negotiations by telephone and mail and the mailing of rental payments to Ohio, as required by the lease.

In spite of the Kentucky location of the leased property and a choice-of-law clause providing that Kentucky law governs the lease (clause 44, p. 72a, infra), in January, 1988, respondent sued petitioner in the Court of Common Pleas of Mahoning County, Ohio for an alleged breach of the lease. Petitioner immediately moved to dismiss the complaint on the grounds that Ohio lacked personal jurisdiction over petitioner. In its motion and brief and supplemental brief, petitioner raised the issue that an Ohio court's exercise of personal jurisdiction over petitioner would violate petitioner's due process rights and would contravene this Court's decisions in International Shoe Co. v. Washington, 326 U.S. 310

[1]The only states in which petitioner has ever operated its stores are: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee and Virginia.

(1945) and its progeny. See p. 18a, infra.

On September 20, 1988, the Court of Common Pleas sustained petitioner's motion to dismiss and ordered respondent's complaint dismissed. See p. 17a, infra. In its judgment entry, theCourt of Common Pleas did not specifically rely on International Shoe, but instead relied on Ohio State Tie & Timber, Inc. v. Paris Lumber Co., 8 Ohio App.3d 236, 456 N.E.2d 1309 (1982) to determine that "the contract between Defendant and the State of Ohio [was] insufficient to make it fair and reasonable for the out-of-state corporation to defend a suit in this jurisdiction." P. 17a, infra.

Respondent appealed the decision to the Ohio Court of Appeals for the Seventh District, Mahoning County, Ohio. In its brief, the respondent argued that petitioner was amenable to Ohio jurisdiction pursuant to Ohio's long-arm statute, that the exercise of such jurisdiction comported with due process and that the exercise of such jurisdiction would be consistent with this Court's decisions in International Shoe v. Washington, 326 U.S. 310 (1945), McGee v. International Life Ins. Co., 355 U.S. 220 (1957), Shaffer v. Heitner, 433 U.S. 186 (1977), World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980) and Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985).

The Court of Appeals affirmed the Court of Common Pleas' decision. In affirming, the court primarily relied on two decisions, Anilas, Inc. v. Kern, 31 Ohio St.3d 163, 509 N.E.2d 1267 (1987) and Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). In its opinion, the court stated:

> In the case of Burger King Corp. v. Rudzewicz (1985), 471 U.S. 462, the United States Supreme Court imposed jurisdiction on an out-of-state litigant based upon the test that 'he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by the benefits and protection of the forum's laws, it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.'

> In the instant case, based upon the contract between the parties, the appellee's activities, very specifically, were not shielded by the benefits and protections of Ohio law. The parties very specifically provided that the conditions of the lease would be governed by and construed in accordance with the laws of the State of Kentucky.

p. 15a, infra (emphasis supplied by the Court of Appeals). The court held that because the parties had agreed that Kentucky law would control the lease, it was not foreseeable that petitioner would be haled into court in Ohio for litigation concerning the lease. The court went on to state that because "foreseeability is one of the primary factors to be considered in determining whether there are sufficient minimum contacts," Anilas, Inc. v. Kern, 31 Ohio St.3d 163, 164, 509 N.E.2d 1267 (1987), to force petitioner to litigate in Ohio would violate the principles of Anilas, Inc. v. Kern, 31 Ohio St.3d 163, 509 N.E.2d 1267 (1987), and the cases cited in that decision, including International Shoe, Hanson v. Denkla, 357 U.S. 235 (1958), Shaffer v. Heitner, 433 U.S. 186 (1977), World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286 (1980), Travelers Health Assn. v. Virginia, 339 U.S. 643 (1950) and Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). Anilas at 164, p. 14a-15a, infra.

On July 28, 1989, respondent appealed to the Supreme Court of Ohio. On August 8, 1990, the Supreme Court of Ohio reversed the decision of the court of appeals and remanded the case for further proceedings. The Ohio Supreme Court first decided that petitioner's activities with respondent reached the level of "transacting business" in Ohio pursuant to Ohio Rev. Code Ann. § 2307.382 (Anderson Supp. 1989) and Ohio Civ. R. 4.3. The court stated:

> Accordingly, we hold that a commercial nonresident lessee, for purposes of personal jurisdiction, is "transacting any business" within the plain and common meaning of this phrase, where the lessee negotiates, and through the course of dealing becomes obligated, to make payments to its lessor in Ohio.

p. 6a, infra. Next, the court considered "whether the assertion of personal jurisdiction by an Ohio court over Mitchell's comports with the Due Process Clause of the Fourteenth Amendment." p. 6a, infra. The court concluded that merely because petitioner conducts business outside Georgia and entered into a lease with an Ohio-based limited partnership, an Ohio court's exercise of jurisdiction over petitioner comports with due process.

## REASONS FOR GRANTING THE WRIT

### I.

**The Ohio Supreme Court's assertion that Ohio courts may exercise personal jurisdiction over a nonresident lessee violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution and conflicts with decisions of this Court and courts of other states.**

The Supreme Court of Ohio has attempted to expand the "permissible scope of state jurisdiction over foreign corporations and other nonresidents," McGee v. International Life Ins. Co., 255 U.S. 220, 222 (1957), by slighting constitutional considerations, to allow a landlord to sue its tenant in the landlord's home state, with little consideration of the tenant's connections with the state. By equating a "lease agreement" with a "franchise agreement," the court has ignored the minimum contacts analysis it was required to pursue in order to exercise long-arm jurisdiction, without violating due process concerns, over petitioner. In doing this, the court has violated the principles of International Shoe Co. v. Washington, 326 U.S. 310 (1945) and its progeny including Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). If this decision is allowed to stand, all landlord-tenant cases will be litigated in the landlord's home state, regardless of the location of the leased premises.

In World-Wide Volkswagen Corp. v. Woodson, 44 U.S. 286 (1980), this Court stated that "[t]he Due Process Clause, by ensuring the 'orderly administration of the laws,' gives a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." Id. at 297 (quoting International Shoe Co. v. Washington, 326 U.S. 310, 319 (1945)).

This Court established the modern due process requirements for the exercise of personal jurisdiction over a nonresident defendant in International Shoe Co. v. Washington, 326 U.S. 310

(1945), holding that "due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Id. at 316 (emphasis supplied) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). Subsequently, the Court has refined this standard.

For example, in Hanson v. Denkla, 357 U.S. 235 (1958), this Court stressed that it is the defendant's contacts with the forum which are important and that the "unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State." Id. at 253. Similarly, in Shaffer v. Heitner, 433 U.S. 186 (1977), Kulko v. Superior Court, 436 U.S. 84 (1978), and Rush v. Savchuk, 444 U.S. 320 (1980), this Court emphasized that the defendant's relationship with the forum is more important than the defendant's mere ownership of property in the forum (Shaffer), the forum state's interests in resolving the litigation (Kulko), and the plaintiff's ties with the forum (Rush).

The conflict between Hanson, Shaffer, Kulko and Rush and the instant case could not be more complete. In the case at bar, the Supreme Court of Ohio stressed the respondent's interests in resolving the litigation in Ohio and the State of Ohio's interests in providing its citizens with a forum over the petitioner's interests. Of particular relevance is the following quote from the opinion:

> [A]ppellant's and the forum state's interest in adjudicating the dispute is strong. The General Assembly, pursuant to R.C. 2307.382(A)(1), intended to provide a forum for Ohio residents. Likewise, '. . . Ohio has an interest in resolving suits brought by one of its residents and has a substantial interest in seeing that its residents get the benefit of their bargain. . .'

p. 10a, infra (quoting Wright Int'l Express, Inc. v. Roger Dean Chevrolet Inc., 689 F. Supp 788, 791 (S.D. Ohio 1988)). The court's focus on the respondent's interests and the respondent's contacts with the State of Ohio is again apparent in its listing of petitioner's

purported contacts. In its opinion the court states:

> Mitchell's conducted negotiations of the lease terms by telephone contact to Ohio with appellant, an Ohio-based limited partnership. Mitchell's intentionally and purposefully directed activities at Ohio when it agreed to the contract terms, signed the document in Georgia and sent it to Ohio to be signed by appellant. The ten-year lease requires that Mitchell's submit to appellant on a monthly or annual basis rental payments, maintenance costs, association fees and sales reports. If Mitchell's refuses to make the contractually required payments in Ohio, as alleged by appellant, such refusal will undoubtedly cause foreseeable injuries. Further, Mitchell's is not provided with unfettered control of its retail sale and rental operation. The lease calls for appellant's approval in many areas and aiso restricts or regulates many activities. Mitchell's is also aware that all communications need be directed to appellant in Ohio.

p. 8a-9a, infra. Upon examination of the criteria recited by the Ohio Supreme Court, it is clear that this list is merely a list of respondent's ties to Ohio; these regulations of petitioner's conduct are incidental to the purpose of the contract -- to establish a Mitchell's Formal Wear store in Paducah, Kentucky. Such contact based upon the mere fortuitous consequence of respondent's place of residence is insufficient to support a finding that petitioner has purposefully established such meaningful contacts and connections with Ohio that it should reasonably be expected to appear there to defend an action based upon its alleged failure to perform its part of the contract in Georgia. See, Signet Bank/Virginia v. Tillis, 196 Ga. App. 433 (1990). Respondent's location is irrelevant; the object of the contract is unit number 640 located in the Kentucky Oaks Mall, Paducah, Kentucky.

Equally in conflict with the decision below is Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985), the case the Supreme Court of Ohio relied on most heavily in its opinion. The decision

below conflicts with Burger King in three respects: first, the Ohio Supreme Court considered factors, other than the petitioner's contacts with the forum, more important in determining whether it was constitutionally permissible to exercise jurisdiction over petitioner; second, the Ohio Supreme Court equated the lease agreement in the instant case with the franchise agreement at issue in Burger King, ignoring the realities of the situation; third, the Supreme Court of Ohio ignored Burger King's directives concerning the jurisdictional effect of choice-of-law provisions in contracts. In Burger King, Justice Brennan wrote:

> Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.' International Shoe Co. v. Washington, 326 U.S. at 320, 66 S.Ct. at 160. Thus, courts in 'appropriate case[s]' may evaluate 'the burden on the defendant,' 'the forum State's interests in adjudicating the dispute,' 'the plaintiff's interest in obtaining convenient and effective relief,' 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the 'shared interest of the several States in furthering fundamental substantive social policies.'

Burger King at 476-477 (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 292 (1980)). Justice Brennan made it clear that the "other factors" should be considered only after it has been decided that a defendant purposefully established minimum contacts within the forum state. The Supreme Court of Ohio's consideration of the "other factors" such as the respondent's interest in litigating in Ohio, the forum State's interests, and the burdens on the petitioner, took on paramount importance, over and above its consideration of petitioner's purposefully establishing contacts with the forum, in its decision to exercise jurisdiction over petitioner.

Similarly, the Supreme Court of Ohio ignored the realities of petitioner's relationship with the respondent and the forum and instead equated the lease agreement at issue in this case with the franchise agrement at issue in Burger King. Based on this faulty assumption, the court concluded that petitioner had established sufficient contacts with Ohio so that Ohio courts might exercise jurisdiction over petitioner. In its opinion the court states that it considers the Burger King decision because that case "involved a contract dispute substantially similar to the issue presented before us today." p. 7a, infra. This is not so. The purpose of the franchise agreement in Burger King was to establish one more Burger King restaurant. The store in Michigan was known as a Burger King -- both the franchisor and the franchisee had the same identity. The Florida franchisor regulated virtually every aspect of the operation. In the instant case, the purpose of the lease agreement was to establish a Mitchell's Formal Wear store in Kentucky; any regulation of the petitioner by the respondent was incidental to this purpose. Respondent's only connection with petitioner's purpose was that it owned the Kentucky real estate. Thus, although the Supreme Court of Ohio heavily relies on Burger King in its analysis of the facts of the case, the contracts at issue in the two cases are factually dissimilar.

Finally, the Supreme Court of Ohio ignored the directives in Burger King concerning the jurisdictional importance of choice-of-law provisions. In Burger King, one of the defendant's contacts with the State of Florida was that the franchise agreement specifically provided that Florida law would govern any disputes concerning the franchise agreement. In discussing the importance of the choice-of-law provision, this Court stated:

Moreover, we believe the Court of Appeals gave insufficient weight to provisions in the various franchise documents providing that all disputes would be governed by Florida law. The franchise agreement, for example, stated:

> 'This Agreement shall become valid when executed and accepted by BKC at Miami, Florida; it shall be deemed made and entered into in the State of Florida and shall be governed and construed under and in accordance with the laws of the State

of Florida. . .'

The Court of Appeals reasoned that choice-of-law provisions are irrelevant to the question of personal jurisdiction, relying on Hanson v. Denkla for the proposition that 'the center of gravity for choice-of-law purposes does not necessarily confer the sovereign prerogative to assert jurisdiction.' 724 F.2d at 1511-1512, n.10, citing 357 U.S., at 254, 78 S.Ct., at 1240. This reasoning misperceives the import of the quoted proposition. The Court in Hanson and subsequent cases has emphasized that choice-of-law analysis -- which focuses on all elements of a transaction, and not simply on the defendant's conduct -- is distinct from minimum-contacts jurisdictional analysis -- which focuses at the threshold solely on the defendant's purposeful connection to the forum. Nothing in our cases, however, suggests that a choice-of-law provision should be ignored in considering whether a defendant has 'purposefully invoked the benefits and protections of a State's laws' for jurisdictional purposes.

Burger King at 481-482. The Supreme Court of Ohio gives no weight to the fact that the parties had agreed that Kentucky law would govern their disputes. Instead, the court merely states that it is "satisfied that the guidelines set forth in Burger King have been met." p. 9a, infra. The court ignores the fact that it was unforeseeable to petitioner that it would be haled into court in Ohio when it had agreed that Kentucky law would govern the lease and the leased premises were located in Kentucky. In fact, the court asserts that merely because petitioner conducts its retail operations outside of Georgia, because petitioner "elected to establish a store bordering appellant's state and considering today's modern means of transportation, it is not unreasonable for Mitchell's to defend itself in Ohio." p. 9a, infra. It is abundantly clear that the Supreme Court of Ohio did not consider whether it was foreseeable for petitioner to be haled into court in Ohio. It is equally clear that the court did not consider, as it was required to do, the fairness of forcing petitioner to defend a suit in Ohio. See, International Shoe Co. v. Washington, 326 U.S. 310 (1945). In essence, the court held that because petitioner is a business, petitioner was subject to the Ohio courts' jurisdiction. The obvious implication is that a business can be haled into court in any state, regardless of the business'

contacts with the state.

The decision of the Supreme Court of Ohio conflicts with decisions of other jurisdictions. Directly on point with the decision below is Grossman v. Wal-Mart Stores, Inc., 682 F. Supp. 752 (S.D.N.Y 1988). In Grossman, the defendant, a Delaware corporation with its principal place of business in Arkansas, operated retail stores throughout various states. The defendant operated no stores in New York. However, the defendant purchased goods in New York for resale elsewhere and maintained an office in New York for the convenience of its buying agents, when they were on buying trips in New York. The plaintiff, a resident of New York, and the out-of-state defendant entered into a lease agreement for retail space in Tennessee. The plaintiff sued the defendant in New York for an alleged breach of the lease. The court held that it lacked jurisdiction over the nonresident debtor. See, also, Advance Realty Associates v. Krupp, 636 F. Supp 316 (S.D.N.Y. 1986) (New York court had no jurisdiction over Massachusetts defendant in lawsuit arising out of New York plaintiff's sale of Illinois property to defendant) and DelBello v. Japanese Steak House, Inc., 43 A.D.2d 455, 352 N.Y.S.2d 537 (N.Y. App. Div. 1974) (New York courts had no jurisdiction over Florida franchisor in lawsuit arising out of New York franchisee's attempt to rescind the franchise contract). In Northern Trust Co. v. Randolph C. Dillon, Inc., 558 F. Supp. 1118 (N.D. Ill. 1983), the court held that it had no jurisdiction over a California corporation in an action involving a lease entered into with an Illinois corporation for equipment located outside of Illinois. In that case, the contract was accepted in Illinois, the contract contained a choice-of-law clause that provided Illinois law would govern, the defendant engaged in telephone calls with the Illinois plaintiff and the defendant made payments on the lease to the plaintiff in Illinois. Nevertheless, the court held that "[t]hese contacts are not sufficient to satisfy the requirements of due process." Id. at 1122.

Similarly, in Arthur, Ross & Peters v. Housing, Inc., 508 F.2d 562 (5th Cir. 1975), the Fifth Circuit held that the District Court for the Southern District of Texas had properly dismissed the lawsuit against the defendant for lack of in personam jurisdiction. The lawsuit arose from the defendant's alleged breach of an agree-

ment involving the purchase of real estate and the formation of a limited partnership between the North Carolina defendant and the Texas plaintiff. The real estate was not located in Texas. The plaintiff alleged that the defendant was subject to jurisdiction in Texas because it entered into a contract by mail with a Texas resident, part of the contract was to be performed in Texas, negotiations for the agreements were carried on by mail between the Texas and North Carolina parties and the contract was mailed to plaintiff's Texas place of business for signing. In dismissing, the court stated, "After considering the facts alleged in the pleadings, memoranda and affidavits filed herein, the quality, nature and extent of the contacts that the defendant has with the State of Texas are not sufficient, individually or together, to satisfy the requirement that the defendant purposefully invoke the benefits or protection of the law of Texas." Id. at 565 (quoting the unreported opinion of the district court which was attached to the Fifth Circuit's opinion as an appendix).

In Signet Bank/Virginia v. Tillis, 196 Ga. App. 433 (1990) the Georgia Court of Appeals affirmed the trial court's refusal to domesticate a Virginia judgment, ruling that the Georgia defendant had insufficient contacts with Virginia such that he could reasonably be expected to defend a lawsuit there. The Virginia plaintiff had extended a contract for a credit card to the defendant. The defendant signed the contract, mailed it to Virginia, used the credit card and mailed payments to Virginia. The court held that the defendant's contacts in Virginia were insufficient for the Virginia court to exercise personal jurisdiction over him.

In light of these cases, it is clear that the Supreme Court of Ohio has created a confusing precedent, likely to generate even further confusion among other courts. The precedent violates the principles of Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985), in three ways: first, the Ohio Supreme Court considered factors, other than the petitioner's contacts with the forum, more important in determining whether it was constitutionally permissible to exercise jurisdiction over petitioner; second, the Ohio Supreme Court equated the lease agreement in the instant case with the franchise agreement at issue in Burger King, ignoring the realities of the situation; third, the Supreme Court of Ohio ignored Burger

King's directives concerning the jurisdictional effect of choice-of-law provisions in contracts. It is equally clear that the decision is in conflict with decisions of other states.

If the decision is allowed to stand, it will have far-reaching effects. For example, according to the instant decision, if an Alaska corporation leases California property from a Florida corporation, the Florida corporation will be able to sue the Alaska corporation in Florida, even if the parties had stipulated that California law would govern, and even if the Alaska corporation's only contacts with Florida were through the mails and by telephone. Similarly, a landlord that leases to various tenants property located throughout the United States will be able to merely maintain a post office box in a community in which it feels beneficial to litigate and sue its tenant in that community. Although this is an extreme case, its facts are not outside the realm of the instant decision. Plenary consideration by this Court is essential in order to give other courts guidance in determining when it is constitutionally permissible to exercise jurisdiction over a nonresident defendant.

## CONCLUSION

For these various reasons, this petition for certiorari should be granted.

Respectfully submitted,

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# APPENDIX

# THE SUPREME COURT OF OHIO

1990 TERM

To wit: August 8, 1990

| | | |
|---|---|---|
| Kentucky Oaks Mall Company, | : | |
| Appellant, | : | Case No. 89-1337 |
| v. | : | JUDGMENT ENTRY |
| Mitchell's Formal Wear, Inc. | : | APPEAL FROM THE |
| Appellee. | : | COURT OF APPEALS |

This cause, here on appeal from the Court of Appeals for Mahoning County, was considered in the manner prescribed by law. On consideration thereof, the judgment of the court of appeals is reversed and the cause is remanded to the trial court for further proceedings consistent with the opinion rendered herein.

It is further ordered that the appellant recover from the appellee its costs herein expended; and that a mandate be sent to the Court of Common Pleas for Mahoning County to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Mahoning County for entry.

(Court of Appeals No. 88CA183)

/S/ _____

THOMAS J. MOYER

Chief Justice

# IN THE SUPREME COURT OF OHIO

KENTUCKY OAKS MALL COMPANY, APPELLANT, v.

MITCHELL'S FORMAL WEAR, INC., APPELLEE.

[Cite as Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc. (1990), 53 Ohio St. 3d 73.]

Civil procedure -- Personal jurisdiction -- Commercial nonresident lessee is "transacting any business" within the plain and common meaning of the phrase when through the course of dealing it becomes obligated to make payments to its lessor in Ohio -- R.C. 2307.382(A)(1) and Civ. R. 4.3(A)(1), construed and applied.

O.Jur 3d Courts § 280.

A commercial nonresident lessee, for purposes of personal jurisdiction, is "transacting any business" within the plain and common meaning of the phrase where the lessee negotiates, and through the course of dealing becomes obligated, to make payments to its lessor in Ohio. (R.C. 2307.382[A][1] and Civ. R. 4.3[A][1], construed and applied.)

(No. 89-1337 -- Submitted June 6, 1990 -- Decided August 8, 1990.)

Appeal from the Court of Appeals for Mahoning county, No. 88 C.A.183

Appellee, Mitchell's Formal Wear, Inc. ("Mitchell's"), a Georgia corporation, allegedly defaulted on a lease agreement between it and appellant, Kentucky Oaks Mall Company, an Ohio-based limited partnership. Appellant sued Mitchell's in the Court of Common Pleas of Mahoning County, Ohio, to recover "leasehold charges" due and owing appellant.

The lease agreement between appellant as lessor, and Mitchell's as lessee, concerned a storeroom known as Unit No. 640 in the Kentucky Oaks Mall, Paducah, Kentucky. Mitchell's is engaged in the retail sale and rental of formal wear. Mitchell's operates one hundred one stores in eleven states primarily in the Southeastern United States. It is undisputed that at least part of the negotiations concerning the lease were conducted by telephone calls to and from Ohio. Mitchell's signed the lease in Georgia and mailed the document to Ohio where, it appears from the record,

appellant signed the contract. The lease is for a term of ten years and requires that all communications be sent to appellant's home office in Youngstown, Ohio. All lease payments are to be sent to a Cleveland, Ohio address. In addition, Mitchell's is required on a periodic basis to pay a "common area maintenance" cost and "merchants association" fee to appellant. Rental payments consist of a minimum yearly amount to be paid monthly and a percentage of gross sales if sales reach a fixed level. As a result, Mitchell's is required to submit monthly and annual sales reports to appellant. The lease, among other matters, requires Mitchell's to obtain approvals from appellant and restricts or regulates many activities. Furthermore, clause 44 of the lease states that the lease shall be governed and construed by Kentucky law.

On January 8, 1988, appellant filed its complaint against Mitchell's. The trial court granted Mitchell's motion to dismiss for lack of personal jurisdiction.

Appellant appealed to the Court of Appeals for Mahoning County. The court of appeals affirmed the trial court and reasoned in part:

"In the instant case, based upon the contract between the parties, the appellee's activities, very specifically were not shielded by the benefits and protections of Ohio law. The parties very specifically provided that the conditions of the lease would be governed by and construed in accordance with the laws of the State of Kentucky.

"Based upon the agreement as to the pertinent law, it is our opinion that under the test of foreseeability, it could not be said that the appellee, upon the execution of the subject lease, should have reasonably anticipated being haled into a court within the State of Ohio."

The cause is now before this court pursuant to the allowance of a motion to certify the record.

David A. Fantauzzi and Daniel P. Daniluk, for appellant.

Fleck, Mostov & Schwartz, Jeffrey B. Fleck, Mary DeGenaro, Harmon, Smith & Bridges and Archer D. Smith, III, for appellee.

Douglas, J. Pursuant to Civ. R. 12(B)(2), Mitchell's moved to dismiss appellant's complaint for lack of personal jurisdiction. The trial court, on that basis, dismissed the complaint and the court of appeals affirmed. Thus, we must first decide whether Mitchell's conduct falls within Ohio's "long-arm statute" or applicable civil rule, and if the statute or civil rule confers personal jurisdiction,

then we must determine whether granting jurisdiction comports with the Due Process Clause of the Fourteenth Amendment to the United States Constitution. See Fallang v. Hickey (1988), 40 Ohio St. 3d 106, 532 N.E.2d 117.

I

In this appeal, personal jurisdiction over a nonresident defendant is governed by R.C. 2307.382, which states in relevant part:

"(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:

"(1) Transacting any business in this state;

" * * *

"(C) When jurisdiction over a person is based solely upon this section, only a cause of action arising from acts enumerated in this action may be asserted against him." (Emphasis added.)

Likewise, the applicable civil rule is Civ. R. 4.3(A)(1), which authorizes out-of-state service of process on a defendant who is "* * * [t]ransacting any business in this state[.]" Mitchell's argues that, pursuant to Section 5(B), Article IV of the Ohio Constitution,[1] Civ. R. 4.3(A)(1) supersedes R.C.2307.382(A)(1). We disagree and find that the statute and civil rule are consistent and in fact complement each other. R.C. 2307.382(A)(1) authorizes a court to exercise personal jurisdiction over a nonresident defendant, whereas Civ. R. 4.3(A)(1) provides for service of process to effectuate that jurisdiction. Both require that the nonresident be "transacting any business" in Ohio.

Appellant asserts that the negotiations prior to the signing of the lease, and the subsequent duties and obligations created by the agreement, are sufficient to establish that Mitchell's is transacting business in Ohio. Mitchell's, on the other hand, contends that because the physical location of the leased storeroom is in Kentucky, it is Kentucky, not Ohio, where all business is transacted. We again disagree.

It is clear that R.C. 2307.382(A)(1) and Civ. R. 4.3(A)(1) are very broadly worded and permit jurisdiction over nonresident defendants who are transacting any business in Ohio. "Transact,"

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[1]Section 5(B), Article IV of the Ohio Constitution states in relevant part: "* * * All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect."

as defined by Black's Law Dictionary (5 Ed. 1979) 1341, "* * * means to prosecute negotiations; to carry on business; to have dealings * * *. The word embraces in its meaning the carrying on or prosecution of business negotiations but it is a broader term than the word 'contract' and may involve business negotiations which have been either wholly or partly brought to a conclusion * * *." (Emphasis added.)

In the case at bar, Mitchell's negotiated the lease by telephone contact to Ohio with an Ohio-based limited partnership. Mitchell's intentionally and voluntarily entered into a ten-year contract by signing the document in Georgia and mailing it to Ohio. The document creates ongoing duties and obligations for the life of the contract. Undoubtedly, both parties sought the benefit of each other's bargain in hopes of realizing a pecuniary gain. The fact that Mitchell's maintained no physical presence in Ohio does not preclude a finding that it transacted business in this state.

Thus, we are convinced that Mitchell's conduct falls unequivocally within the plain and broad language of R.C. 2307.382(A)(1) and Civ. R. 4.3(A)(1). Similarly, our finding is reinforced by the fact other courts have passed on this issue reaching the same result, to-wit: that a lease agreement, in certain circumstances, is "transacting business" within the forum state's long-arm statute. See, e.g., Wright Internatl. Express, Inc. v. Roger Dean Chevrolet, Inc. (S.D. Ohio 1988), 689 F. Supp. 788; Vena v. Western General Agency, Inc. (N.D. Ill. 1982), 543 F. Supp. 779; Klippel v. Heintz (1982), 231 Kan. 312, 644 P. 2d 428; Schanno Transp., Inc. v. Smith (Minn. 1981), 312 N.W. 2d 114; SD Leasing, Inc. v. Al Spain & Assoc., Inc. (1982), 277 Ark. 178, 640 S.W. 2d 451.

Accordingly, we hold that a commercial nonresident lessee, for purposes of personal jurisdiction, is "transacting any business" within the plain and common meaning of the phrase, where the lessee negotiates, and through the course of dealing becomes obligated, to make payments to its lessor in Ohio.

II

Once having decided that Mitchell's conduct falls within the purview of R.C. 2307.382(A)(1) and Civ. R. 4.3(A)(1), the question becomes whether the assertion of personal jurisdiction by an Ohio court over Mitchell's comports with the Due Process Clause of the Fourteenth Amendment.

Over forty years ago, in International Shoe Co. v. Washington, (1945), 326 U.S. 310, the court announced that a state may assert personal jurisdiction over a nonresident defendant if the nonresident has "* * * certain minimum contacts with it such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (Citation omitted.) Id. at 316. Since 1945, the court, on numerous occasions, has elected to address the Due Process Clause as it pertains to personal jurisdiction over a nonresident defendant. In particular, for purposes of this appeal, we turn our attention to Burger King Corp. v. Rudzewicz (1985), 471 U.S. 462, which involved a contract dispute substantially similar to the issue presented before us today.

In Burger King, Rudzewicz, a franchisee residing in Michigan, was sued in Florida by Burger King, a Florida-based corporation, for breach of contract and trademark infringement. The contract was negotiated with both the Florida-based headquarters of Burger King and its Michigan district office. The twenty-year lease provided that the relationship would be governed by Florida law and it required that all monthly fees and relevant notices be sent to the Florida headquarters. The court ruled that the assertion of jurisdiction did not offend due process and stated:

"* * * Rudzewicz established a substantial and continuing relationship with Burger King's Miami headquarters, received fair notice from the contract documents and the course of dealing that he might be subject to suit in Florida, and has failed to demonstrate how jurisdiction in that forum would otherwise be fundamentally unfair * * *" Id. at 487.

Justice Brennan, in writing for the majority of the court, reviewed prior cases and concluded that "* * * the constitutional touchstone remains whether the defendant purposefully established 'minimum contacts' in the forum State. International Shoe Co. v. Washington, supra, at 316." (Emphasis added.) Id. at 474. The nonresident defendant has purposefully established minimum contacts "* * * where the contacts proximately result from actions by the defendant himself that create a 'substantial connection' with the forum State * * * where the defendant 'deliberately' has engaged in significant activities within a State * * * or has created 'continuing obligations' between himself and residents of the forum * * * he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in the forum as well." (Citations omitted and emphasis

added in part.) Id. at 475-476. Furthermore, minimum contacts are satisfied when the defendant foreseeably causes injury in the forum state if "* * * the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.' * * *" Id. at 474 (quoting World-Wide Volkswagen Corp. v. Woodson [1980], 444 U.S. 286, 297).

Justice Brennan also noted that the question of whether personal jurisdiction exists does not end with a finding that the nonresident defendant has purposely established minimum contacts and stated:

"Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.' * * * Thus courts in 'appropriate cases[s]' may evaluate 'the burden on the defendant,' 'the forum State's interest in adjudicating the dispute,' 'the plaintiff's interest in obtaining convenient and effective relief,' 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' and the 'shared interest of the several States in furthering fundamental substantive social policies.' * * * These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required. * * * On the other hand, where a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." (Citations omitted and emphasis added.) Id. at 476-477.

In light of the guidelines articulated above, and after a thorough review of the record before us, it is apparent that Mitchell's purposefully directed activities at an Ohio-based limited partnership, so that it could reasonably anticipate being haled into an Ohio court. Moreover, it is equally evident that the assertion of personal jurisdiction over Mitchell's comports with fair play and substantial justice.

Mitchell's conducted negotiations of the lease terms by telephone contact to Ohio with appellant, an Ohio-based limited partnership. Mitchell's intentionally and purposefully directed activities at Ohio when it agreed to the contract terms, signed the document in Georgia and sent it to Ohio to be signed by appellant. The ten-year lease requires that Mitchell's submit to appellant on a monthly or annual basis rental payments, maintenance costs,

association fees and sales reports. If Mitchell's refuses to make the contractually required payments in Ohio, as alleged by appellant, such refusal will undoubtedly cause foreseeable injuries. Further, Mitchell's is not provided with unfettered control of its retail sale and rental operation. The lease calls for appellant's approval in many areas and also restricts or regulates many activities. Mitchell's is also aware that all communications need be directed to appellant in Ohio.

Mitchell's, as does the court of appeals, urges that because the lease explicitly states that Kentucky law controls the rights of the parties, Mitchell's is not shielded by the benefits and protections of Ohio law, and, therefore, it could not reasonably have anticipated being haled into an Ohio court. We disagree.

Although the lease contains a choice-of-law provision, this, standing alone, does not automatically defeat a finding that minimum contacts exist. Burger King, supra, at 478. Whether a nonresident defendant purposefully established minimum contacts with the forum depends upon the dealings between the parties prior to and following the document's execution, contemplated future consequences, along with the terms of the contract. Id. at 479. We are aware that the choice-of-law provision may be a significant factor in the overall picture; however, considering Mitchell's dealings and the creation of continuing duties and obligations with appellant, we are satisfied that the guidelines set forth in Burger King have been met.

Having found that Mitchell's purposefully established minimum contacts with Ohio, it now remains only to inquire whether the assertion of jurisdiction comports with "fair play and substantial justice."

Initially, we find that the burden on Mitchell's is not excessive. Again, in Burger King, supra, the court noted that "* * * because 'modern transportation and communications have made it much less burdensome for a party sued to defend himself in a State where he engages in economic activity,' it usually will not be unfair to subject him to the burdens of litigating in another forum for disputes relating to such activity. McGee v. International Life Insurance Co. [(1957), 355 U.S. 220] * * *." Id. at 474. Mitchell's, a Georgia corporation, operates one hundred one stores throughout the Southeastern United States and Kentucky. Based on Mitchell's extensive operations, the fact that it elected to establish a store bordering appellant's state and considering today's modern means of transportation, it is not unreasonable for Mitchell's to defend itself in Ohio.

Finally, appellant's and the forum state's interest in adjudicating the dispute is strong. The General Assembly, pursuant to R.C. 2307.382(A)(1), intended to provide a forum for Ohio residents. Likewise, "* * * Ohio has an interest in resolving suits brought by one of its residents and has a substantial interest in seeing that its residents get the benefit of their bargains. * * *" Wright Internatl. Express, Inc., supra, at 791.

Accordingly, we reverse the judgment of the court of appeals and find that the trial court had an adequate basis upon which to assert personal jurisdiction over Mitchell's. The cause is remanded to the trial court for further proceedings consistent with this opinion.

Judgment reversed and cause remanded.

Moyer, C.J., Sweeney, Homes, Wright, H. Brown and Resnick, JJ., concur.

**[ENTERED JUNE 29, 1989]**

STATE OF OHIO ) IN THE COURT OF APPEALS OF OHIO
)
MAHONING
COUNTY ) SS: SEVENTH DISTRICT

KENTUCKY OAKS MALL CO., )

PLAINTIFF-APPELLANT, )CASE NO. 88 C.A. 183

-VS- ) JOURNAL ENTRY

MITCHELL'S FORMAL WEAR,
INC., )

DEFENDANT-APPELLEE. )

For the reasons stated in the opinion rendered herein, the assignment of error is overruled and it is the final judgment and order of this court that the judgment of the Common Pleas court of Mahoning County, Ohio, is affirmed. Costs to be taxed against appellant.

/s/ Joseph E. O'Neill

/s/ Joseph Donofrio

/s/ Edward A. Cox

JUDGES.

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

| | |
|---|---|
| KENTUCKY OAKS MALL CO., | ) |
| PLAINTIFF-APPELLANT, | )CASE NO. 88 C.A. 183 |
| - VS- | ) OPINION |
| MITCHELL'S FORMAL WEAR, INC., | ) |
| DEFENDANT-APPELLEE. | ) |
| CHARACTER OF PROCEEDINGS: | Civil Appeal from Mahoning County Common Pleas Court Case no. 88-cv-57 |
| JUDGMENT: | Affirmed. |
| APPEARANCES: | |
| For Plaintiff-Appellant: | Daniel P. Daniluk<br>Jay Blackstone<br>2445 Belmont Avenue<br>Youngstown, Ohio<br>44505-0186 |

For Defendant-Appellee: Jeffrey B. Fleck
Mary DeGenero
1100 Wick Building
Youngstown, Ohio 44503
and
Archer D. Smith, III
Harmon, Smith &
Bridges
1759 Peachtree
Road, N.E.
Atlanta, Georgia 30309

JUDGES:

Hon. Joseph E. O'Neill

Hon. Joseph Donofrio

Hon. Edward A. Cox

DATED: June 29, 1989.

O'NEILL, P.J.

The appellant filed a complaint in the lower court alleging that it and the appellee had entered into a lease on or about March 28, 1985, in Youngstown, Ohio, whereby the appellee leased from the appellant certain premises in the Kentucky Oaks Mall in Paducah, Kentucky. Basically, the complaint alleged that the appellee had breached the lease and prayed for a money judgment against the appellee along with the costs of the action, including court costs and attorney fees.

The appellee responded to this complaint by filing and serving a motion to dismiss contending that Mahoning County was an improper venue for the case and, further, that the lower court lacked in personam jurisdiction of the appellee.

After both parties had filed briefs and after the conduct of an evidentiary hearing, the trial judge found for the appellee and dismissed the complaint.

The trial judge ruled in part that, based upon the evidence and upon the contract, it was not "fair and reasonable for the out-of-state corporation to defend a suit in this jurisdiction."

A timely notice of appeal was filed from this judgment.

In disposition of this case, we find very pertinent hereto a portion of the opinion of the Ohio Supreme Court as set forth in the case of Anilas, Inc. v. Kern (1987), 31 Ohio St. 3d 163. It is set forth by the Supreme Court, at page 164:

> "It is well established that '* * * due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."' International Shoe Co. v. Washington (1945), 326 U.S. 310, 316. Ordinarily, this requires that a party 'purposefully * * * [avail] itself of the privilege of conducting activities within the forum State * * *.' Hanson v. Denckla (1985), 357 U.S. 235, 253. In judging minimum contacts, a court properly focuses on 'the relationship among the defendant, the forum, and the litigation * * *.' Shaffer v. Heitner (1977), 433 U.S. 186, 204.
>
> "Courts have consistently held that foreseeability is one of the primary factors to be considered in determining whether there are sufficient minimum

contacts. '* * *[T]he foreseeability that is critical to due process analysis * * * is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.' World-Wide Volkswagen Corp. v. Woodson (1980), 444 U.S. 286, 297. Thus, where the defendant 'has himself created "continuing obligations" between himself and residents of the forum, Travelers Health Assn. v. Virginia [1950], 339 U.S. at 648, * * * he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by "the benefits and protections" of the forum's laws, it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well. Jurisdiction in these circumstances may not be avoided merely because the defendant did not physically enter the forum State.' (Emphasis sic.) Burger King Corp. v. Rudzewicz (1985), 471 U.S. 462, 475-476."

At the evidentiary hearing, which the trial court conducted, there was introduced and admitted a Joint Exhibit 1 which was a copy of the lease involved. Paragraph 44 of that lease specifically provides:

"* * * This lease shall be governed by and construed in accordance with the applicable laws of the state where the demised premises are located."

In the case of Burger King Corp. v. Rudzewicz (1985), 471 U.S. 462, the United States Supreme Court imposed jurisdiction on an out-of-state litigant based upon the test that "he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by the benefits and protection of the forum's laws, it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well." (Emphasis added).

In the instant case, based upon the contract between the parties, the appellee's activities, very specifically, were not shielded by the benefits and protections of Ohio law. The parties very specifically provided that the conditions of the lease would be governed by and construed in accordance with the laws of the State of Kentucky.

Based upon the agreement as to pertinent law, it is our opinion that, under the test of foreseeability, it could not be said

that the appellee, upon the execution of the subject lease, should have reasonably anticipated being haled into a court within the State of Ohio.

Accordingly, the judgment of the trial court is affirmed.

Donofrio, J., concurs.

Cox, J., concurs.

APPROVED:

/s/ Joseph E. O'Neill

PRESIDING JUDGE.

STATE OF OHIO } IN THE COURT OF COMMON PLEAS

} ss: CASE NO. 88 CV 57

MAHONING
COUNTY } DATE September 20, 1988

KENTUCKY OAKS MALL CO.,

PLAINTIFF **JUDGMENT ENTRY**

VS.

MITCHELL'S FORMAL WEAR, INC.,

DEFENDANT

This cause is before the Court on Defendant's Motion to Dismiss. Defendant contends that the action is improperly venued and that this Court lacks in personam jurisdiction over the Defendant.

Upon review of the evidence presented, briefs of counsel and applicable law, the Court finds the contract between Defendant and the State of Ohio insufficient to make it fair and reasonable for the out-of-state corporation to defend a suit in this jurisdiction. See, Ohio State Tie & Timber vs. Paris Lumber, 8 Ohio App. 3d 236 (1982).

Defendant's Motion To Dismiss is sustained and Plaintiff's Complaint is hereby ordered dismissed at Plaintiff's costs.

APPROVED:

_____
Attorney for Plaintiff

/s/ William G. Houser

_____
Attorney for Defendant JUDGE

**[FILED APRIL 21, 1988]**

IN THE COURT OF COMMON PLEAS

MAHONING COUNTY, OHIO

| | | |
|---|---|---|
| KENTUCKY OAKS MALL CO. | ) | CASE NUMBER 88 CV 57 |
| PLAINTIFF | ) | JUDGE WILLIAM HOUSER |
| vs. | ) | MOTION TO DISMISS |
| MITCHELL'S FORMAL WEAR, INC. | ) | |
| DEFENDANT | ) | |

Now comes the Defendant, Mitchell's Formal Wear, Inc., by and through its counsel, and pursuant to Rule 12(B) of the Ohio Rules of Civil Procedure, moves this Court for an Order dismissing Plaintiff's Complaint on the grounds of improper venue and lack of in personam jurisdiction. The reasons for this motion are stated more fully in the brief attached hereto and incorporated herein as though fully rewritten.

Respectfully submitted,

/s/ _____

JEFFREY B. FLECK, Esq.

MARY DeGENARO, ESQ.

FLECK, MOSTOV & SCHWARTZ

1100 Wick Building

Youngstown, Ohio 44503

216/743-3344

Attorneys for Defendant

## BRIEF

On or about March 28, 1985, Plaintiff (hereinafter referred to as "Cafaro") and Defendant (hereinafter referred to as "Mitchell's") entered into a lease agreement concerning property located in Paducah, Kentucky. One of the inducements to Mitchell's to enter into said lease agreement, was that Cafaro represented that a department store, or anchor store would be located at the end of the mall where Mitchell was leasing space. Based upon this representation, Mitchell's entered into said lease. However, there was no such anchor store, and as a result, Mitchell's sustained significant business loss due to its location within the mall.

Due to a substantial loss of income, in 1986 in the approximately amount of $40,000.00, Mitchell's attempted to negotiate with Cafaro mutually acceptable ground upon which to terminate said lease. These negotiations continued through October, 1987 with various agents of Cafaro who appeared to have actual authority to enter into some sort of settlement agreement.

Sometime in October, 1987 Cafaro and Mitchell's reached an agreement as to terms under which the lease agreement would be cancelled. (Exhibit "A"). Cafaro persuaded Mitchell's to remain as tenants through the end of 1987. Mitchell's was then to vacate the premises by January 8, 1988 and present Cafaro with a check in the amount of $7,000.00 to fully release it of any obligations under the lease. On or about November 23, 1987 Mitchell's executed said agreement and forwarded it to Cafaro. On or about December 28, 1987, Mitchell's forwarded to Cafaro a check in the amount of $7,000.00 (Exhibit "B") pursuant to the oral agreement reached between the parties. Cafaro is still in possession of said check and, contrary to the oral agreement reached by Cafaro and Mitchell's, instituted this action.

Cafaro's Complaint must be dismissed, as not only does this Court lack in personam jurisdiction over Defendant, additionally, this action is improperly venued. Paragraph 44 of the lease agreement provides as follows:

> "44. Governing Law. This lease shall be governed by and construed in accordance with the applicable laws of the state where the Demised Premises are located."

The demised premises are located in the Kentucky Oaks Mall in Paducah, Kentucky. Pursuant to Rule 3(B)(2), (3), (5) and (6), of the Ohio Rules of Civil Procedure and Kentucky Rev. Statutes Sections

452.400 and 452.450, the proper form for this action is the county where the Defendant has its principal place of business, conducted the activity which gave rise to the claim for relief or where the property which is the subject of the action is located. In this case on all three grounds the proper form is McCracken County, Kentucky and not Mahoning County, Ohio. As there is an available forum pursuant to the above-quoted sections of both Ohio and Kentucky Civil Rules, Plaintiff cannot avail itself of Ohio Civ. R. 3(B)(10) which provides that an action may be commenced in the county in which a Plaintiff has its principal place of business.

Further, as Defendant is a Georgia Corporation with its principal place of business located in Atlanta, Georgia, this Court lacks in personam jurisdiction over the Defendant. rule 4.3(A) of the Ohio Rules of Civil Procedure outlines when service is permitted upon a non-resident of this state. A non-resident is subject to service of process when the event out of which the claim which is the subject of the complaint arose from the non-resident's:

> "1.Transacting any business in this state,
> 2.Contracting supply services or goods in this state,...
> 4.Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course or conduct or derived substantial revenue from goods used or consumed or services rendered in this state;" Ohio Civ. R. 4.3(A) 1, 2 and 4

Mitchell's meets none of the above bases for out of state service. The lease agreement was entered into to effect the business of providing a tuxedo rental service in the state of Kentucky, and not in the State of Ohio. Mitchell's does not have any of the minimum contacts set out by Rule 4.3 of the Ohio Rules of Civil Procedure to vest this Court with in personam jurisdiction.

For the foregoing reasons, and upon the authorities cited, Defendant, Mitchell's Formal Wear, Inc., respectfully requests that this Court grant its Motion to Dismiss on the grounds that this action is improperly venued and, further, that this Court lacks in personam jurisdiction over Defendant. Defendant further prays for its costs, including reasonable attorney fees incurred in presenting this Motion, and any other such relief as the Court may find equitable and just.

Respectfully submitted,

/s/ _____

JEFFREY B. FLECK, ESQ.

MARY DeGENARO, ESQ.

FLECK, MOSTOV & SCHWARTZ

1100 Wick Building

Youngstown, Ohio 44503

216/743-3344

Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion to Dismiss has been delivered by regular U. S. Mail to: Daniel Daniluk, Attorney for Plaintiff, 2445 Belmont Avenue, Youngstown, Ohio 44505 this 21st day of April, 1988.

/s/ _____

JEFFREY B. FLECK, Esq.

MARY DeGENARO, ESQ.

Attorneys for Defendant

As they do not pertain to this Petition for Writ of Certiorari, Exhibits A and B to the Motion to Dismiss are not reproduced.

**[FILED ON JUNE 8, 1988]**

IN THE COURT OF COMMON PLEAS

MAHONING COUNTY, OHIO

| | | |
|---|---|---|
| KENTUCKY OAKS MALL CO.,: | | |
| PLAINTIFF, | : | CIVIL ACTION |
| vs. | : | FILE NO. 88-CV-57 |
| MITCHELL'S FORMAL WEAR, INC., | : | JUDGE WILLIAM HOUSER |
| DEFENDANT. | : | |

DEFENDANT'S SUPPLEMENTAL BRIEF OF AUTHORITY IN SUPPORT OF ITS MOTION TO DISMISS

FACTS

In March of 1985, Plaintiff, an Ohio limited partnership, (hereinafter referred to as "Ky. Oaks") and Defendant, a Georgia corporation, (hereinafter referred to as "Mitchell's") entered into a lease agreement concerning property located in Paducah, Kentucky. Mitchell's is a Georgia corporation engaged in tuxedo sales and rentals in the southeastern United States only. Neither of these activities is conducted in Ohio. No officer of or counsel for Mitchell's went to Ohio to conduct negotiations. Mitchell's has no officers, agents or stores in Ohio.

The leased premises was built in Kentucky by a Kentucky contractor. The lease stated that rental payments would be paid to Cafaro in Youngstown, Ohio.

On January 22, 1988, Cafaro sued Mitchell's in Mahoning County, Ohio. The court can take judicial notice of the fact that the Ohio line is approximately 270 miles from the instant shopping center in Paducah, Kentucky. The lease recites that the governing law is the law of the state where the shopping center is located,

namely Kentucky. Mitchell's moved to dismiss the action because Ohio lacks personal jurisdiction over Mitchell's.

I. "TRADITIONAL NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE" REQUIRE THAT THIS CASE BE DISMISSED.

The Due Process Clause "requires . . . that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" International Shoe co. v. Washington, 326 U.S. 310, 316. (1945) (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940)). In Wainscott v. St. Louis-San Francisco Ry. Co., 47 Ohio St.2d 133 (1976), the Ohio Supreme Court applied the guidelines set out in International Shoe and determined that the contacts which existed between the out-of-state defendant and the State of Ohio were insufficient for the State of Ohio to fairly claim jurisdiction. In Wainscott, the Missouri defendant solicited business in Ohio, paid personal and property taxes in Ohio, and maintained two offices in Ohio. The court stated that "[t]he opinion in International Shoe makes it clear that the quality and nature of the activity conducted within a state in a given case must be viewed in relation to the fair and orderly administration of the laws." Id. at 143. In spite of the defendant's substantial activity in Ohio, the court concluded that the existing contacts were not "such as to make it fair and reasonable for the [out-of-state] corporation to defend a suit in this jurisdiction." Id. at 144.

Unquestionably, the Missouri corporation in Wainscott had substantially more contacts with Ohio than does Mitchell's in the present case. The only contacts Mitchell's has with Ohio are the payment of rent to an Ohio location and the fact that the contract was accepted in Ohio. Additionally, the Missouri corporation actively pursued its Ohio contacts by soliciting business there. Mitchell's never solicited business in Ohio; any activities conducted in Ohio were incidental to the leasing of Kentucky property. Consequently, it would not comport with "traditional notions of fair play and substantial justice" for Mitchell's to be forced to defend a suit in Ohio.

The court in Garrett v. Ruth Originals Corp., 456 F.Supp 376 (S.D. Ohio 1978), also applied the guidelines set out in International Shoe to a case construing the Ohio long-arm statute. Their application of the guidelines focused on several factors that the Sixth Circuit had identified as important in the analysis. Id. at 381.

When applying these factors to the present case, the conclusion is no different than that compelled by the Wainscott analysis -- it is unreasonable to require Mitchell's to defend a suit in Ohio.

One of the factors important to a fairness analysis is "presence" in the forum. Presence in the forum is important "because physical contacts 'provide a clue to the significance attached by the defendant to the activities occurring within the forum state -- and thus a clue as to his expectations.'" Garrett at 382 (quoting In-Flight Devices Corp. v. Van Dusen Air, Inc., 466 F.2d 220 (6th Cir. 1972)). In the case at hand, no agent of Mitchell's was physically present in Ohio for purposes involving the lease. According to the Garrett court, the lack of presence, although not dispositive is "significant." Id.

A second factor which must be considered is "the reasonable expectations of the defendants in light of the actual impact upon the forum." Id. The only impact on Ohio resulting from the lease negotiations is "the creation of a duty owed to one of its residents." Id. at 380. The court in Garrett recognized such an obligation as an "extreme case," and a "simple case," Id., unlike the unavoidable impact present in Garrett where the defendant "required that the plaintiff leave his established position of employment and place of residence in Ohio," thereby "withdrawing his human capital from the state." Id.

A third factor to be considered is the "expectations the defendant reasonably should have had with regard to the possibility of defending a suit in a distant forum." Id. at 382. Mitchell's maintains no office in Ohio, none of its representatives spend time there, and it receives no income from Ohio. All contacts Mitchell's has with Ohio are incidental to its leasing of Kentucky real estate from Plaintiff in Kentucky, approximately 270 miles from the Ohio lines. It is unreasonable to contend that Mitchell's should have expected to defend a suit in Ohio.

II. OHIO LACKS IN PERSONAM JURISDICTION OVER MITCHELL'S BECAUSE MITCHELL'S NEVER TRANSACTED ANY BUSINESS IN OHIO.

Ohio Rev.Code §2307.382 provides in pertinent part, that:

(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's: (1) transacting any business in this state; (2) contracting to supply services or goods in this state; and (3) causing tortious injury by an act or omission in this state.

However, according to the Ohio Court of Appeals, "Ohio has not extended long-arm jurisdiction to the limits of due process

but, instead, actual transaction of business in Ohio is a prerequisite to the exercise of long-arm jurisdiction under the circumstances," Ohio State Tie & Timber v. Paris Lumber, 8 Ohio App.3d 236, 238 (1982). Therefore, in addition to the traditional due process minimum contact requirements, see, International Shoe Co. v. Washington, 326 U.S. 310 (1945), Wainscott v. St. Louis - San Francisco Ry. Co., 47 Ohio St. 2d 133 (1976), there is a requirement that an out-of-state resident transact business in Ohio for Ohio to exercise jurisdiction over him. The court in Ohio State Tie & Timber relied on Ohio Civ. R. 4.3(a) to reach this conclusion. Ohio State Tie & Timber, Inc. v. Paris Lumber, 8 Ohio App 3rd 236, 238. Ohio Civ. R. 4.3(A) defines when out-of-state service of process is permitted. The language of the rule parallels the language of the long-arm statute. Civ.R.4.3(A) permits the service of process outside of Ohio upon a non-resident only under certain specified circumstances, including when the non-resident is "transacting any business in this state." Ohio Civ.R. 4.3(A)(1). This subsection of the rule is the only possible basis for Ohio to exercise long-arm jurisdiction over Mitchell's in this case. Therefore, the issue in this case is whether Mitchell's ever transacted any business in the State of Ohio. The answer is no. Mitchell's has insufficient contacts with Ohio to charge it with transacting business in Ohio and thereby subject it to Ohio jurisdiction in that its only contacts with Ohio were the payment of rent to an Ohio location and the fact that the contacts with Ohio were the payment of rent to an Ohio location and the fact that the contract was accepted in Ohio.

Further, the fact that the contract was accepted in Ohio is not a "contact" with Ohio for jurisdictional purposes. Rather, the location of a contract's acceptance usually determines which law will govern the terms of a contract. However, this lease specifically states in paragraph 44 that "[t]he lease shall be governed by and construed in accordance with the applicable laws of the state where the demised premises are located." Because the demised premises are located in Paducah, Kentucky, Kentucky law controls.

Kentucky may assert jurisdiction over both parties while complying with constitutional due process requirements. In Info-Med, Inc. v. National Healthcare, Inc., 669 F.Supp. 793 (W.D.Ky. 1987), the court states, "[i]t is a well established that the Kentucky long-arm statute allows state courts to reach to the full constitutional limits of due process in the extension of jurisdiction over non-resident defendants." Id. at 795. Kentucky's long-arm statute, KRS 454.210(2)(a)(1), states in part:

> A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a claim arising from the person's: 1. Transacting any business in this Commonwealth. . .

Therefore, again the issue is whether both parties were transacting business in Kentucky. The answer is yes.

Ky. Oaks operates the Kentucky Oaks Mall in Paducah, Kentucky. Mitchell's leased a store from Ky. Oaks in that Mall. Certainly, these operations constitute transacting business in Kentucky. Therefore, Kentucky may properly assert jurisdiction over both parties.

Frequently, where the Ohio courts have dismissed cases because of a lack of jurisdiction over an out-of-state defendant, the defendant has had many more contacts with Ohio than does Mitchell's. In Ohio State Tie & Timber, the court granted the defendant's motion to dismiss for lack of personal jurisdiction. The court held that "[t]he ordering of goods from an Ohio resident by telephone from Kentucky by a Kentucky resident, which goods are to be shipped to Kentucky by the Ohio resident does not constitute the transaction of business in Ohio by the Kentucky resident who ordered the goods, even though the goods had to be specially prepared to meet the needs of the Kentucky resident." Id. at 238.

In the case at hand, the defendant's contacts with Ohio are less substantial than the out-of-state defendant's in Ohio State Tie & Timber. In this case, the only contacts between the Ohio resident, Ky. Oaks, and the out-of-state defendant, Mitchell's, were telephone calls and letters through the mail. Never was Cafaro required to specially prepare and ship goods from Ohio to Mitchell's in another state. Moreover, the property covered by the lease agreement between the parties is in Kentucky, not Ohio.

Another case, factually similar to the one at hand, where the Court of Appeals for Ohio found that Ohio had no jurisdiction over a non-resident corporation is NRM Corp. v. Pacific Co., 36 Ohio App.2d 179 (1973). In NRM, an Ohio corporation NRM, filed an action in Ohio court on an account with an Oregon corporation, Pacific. Pacific had signed and mailed to NRM an order for the purchase of machinery. The machinery was manufactured in Ohio and shipped to Oregon. Thirty-three payments were mailed from Oregon to NRM in Ohio over the course of 3 years. Business transactions were conducted by mail and by telephone for the most part. One time, however, Pacific's purchasing agent travelled to Ohio to negotiate differences that had arisen between the parties. Nevertheless, the court held that "the signing, and

mailing, in Oregon, of an order for the purchase of machinery by an Oregon corporation from an Ohio corporation, which machinery is to be shipped to and used in Oregon, is not such a 'minimum contact' in Ohio as to charge the Oregon firm with 'transacting any business' in Ohio, and thereby subject it to the jurisdiction of the Ohio courts. The fact that an agent of NRM visited Akron to compromise the controversy is immaterial." Id. at 182.

The contacts involved in the case at hand are substantially fewer than those involved in NRM. Never did an agent or officer of Mitchell's travel to Ohio. Never was Ky. Oaks required to ship any product to Mitchell's in another state. The only contacts Mitchell's had with Ohio were the negotiations conducted by telephone and mail and the payment of rent to Ky. Oaks in Ohio. Accordingly, Mitchell's has insufficient contacts in Ohio to charge it with transacting any business in Ohio, and to subject it to the jurisdiction of the Ohio courts.

Consistently, when Ohio has asserted jurisdiction over an out-of-state defendant, the contacts the defendant has had with the state are substantially greater that the contacts Mitchell's has with Ohio. For example, in a case with facts similar to the facts of this case, Meadowbrook Mall Co. v. State Side Imports of West Virginia, Inc., Mahoning Common Pleas no. 84-CV-1250 (unreported), the defendant's motion to dismiss for lack of personal jurisdiction was denied because it was found that the defendant had transacted business in the State of Ohio. However, in that case, the defendant had not only negotiated a lease with the plaintiff, an Ohio company, for out-of-state property, but additionally it had negotiated a contract with the plaintiff's contractor, also an Ohio resident. The fact of additional negotiations distinguishes Meadowbrook Mall from the present case.

III. THIS ACTION IS IMPROPERLY VENUED.

By attempting to bring this action in Mahoning County, Ohio, Ky. Oaks has attempted to avail itself of the doctrine of forum non conveniens, which was explicitly rejected by the Ohio Supreme Court in State, ex. rel. Starner v. Deltoff, 18 Ohio St. 3d 163 (1985).

Pursuant to Civ. R. 3, an Action is to be tried where venue is proper, not convenient for the Plaintiff. The Court of Appeals for Trumbull County has held in Beraducce v. Teachers Retirement System, 21 Ohio App. 3d 195 (1984) that the controlling authority interpreting Civ. R. 3, governing venues, is Varketta v. Gen Motors Corp., 34 Ohio App. 2d 1 (1973).

In resolving whether the bases for venue set out in the rule are each alternatives to the other, the Court held:

> "The answer to this question is obvious by a clear reading of the language of this rule. Civil Rule 3(B) establishes a system of priorities. The first nine provisions of 3(B) are alternatives, and each may be a proper basis for venue, but they do not have to be followed in any order. Plaintiff has a choice where the action will be brought if any of the counties specified in C. R. 3(B)(1) through (9) are a proper forum under the facts of the case. The tenth provision under civil Rule 3(B)(10) is available only if none of the first nine is available, and the eleventh provision is only available if none of the first ten is available." Id. at 6.

The decision in Varketta that if a forum pursuant to Civ. R. 3(B)(1) through (9) is available, then action must be venued there (see syllabus).

> This is buttressed by the Ohio Supreme Court's decision in Morrison v. Sterner, 32 Ohio St. 2nd 86 (1972) were the court held:
>
> "The first nine provisions of Civ. R. 3(B) are on an equal status, and any court therein may be a proper and initial peace of venue." Id. at 89.

See also, staff notes to Civ. R. 3(B). There is an available forum under Civ. R. 3(B)(2), (3), (5), and (6) in McCracken County, Kentucky, where this action would be properly venued, and must be brought. Therefore, pursuant to Civ. R. 3(B) and the holding in Varketta and Morrison, Ky. Oaks cannot use Civ. R. 3(B)(1) as a basis for vesting this Court with venue in this action, as the proper venue for this action is McCracken County, Kentucky, which is a forum available to Ky. Oaks. This action must be dismissed for improper venue.

The Mahoning County Common Pleas Court has spoken on these issues. Judge Jenkins in Case No. 84 CV 1206 dismissed the same plaintiff in that case for want of jurisdiction. The facts are basically the same. The law is the same.

## CONCLUSION

The defendant's motion to dismiss should be granted. The

Ohio court lacks personal jurisdiction over the defendants because the defendants have insufficient minimum contacts with Ohio to constitute "the transacting of any business" as required for jurisdiction by Ohio Civ. R. 4.3(A)(1). Additionally, the Ohio court's assertion of personal jurisdiction over the defendants does not comport with "traditional notions of fair play and substantial justice," as required by International Shoe and its progeny.

In addition to the foregoing, plaintiff requests that the Motion to Dismiss be granted on the grounds that this action is improperly venued for the foregoing reasons and upon the authorities cited.

HARMON, SMITH & BRIDGES

/s/ _____

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Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Supplemental Brief of Defendant has been hand delivered this 8th day of June, 1988, to: Daniel Daniluk, Esq. and Jay Blackstone, Esq., Counsel for Plaintiff, at the Mahoning County Courthouse, Youngstown, Ohio 44503.

/s/ _____

JEFFREY B. FLECK, ESQ.

MARY DeGENARO, ESQ.

Attorneys for Defendant

# LEASE

THIS LEASE, made on the 28th day of March, 1985, by and between KENTUCKY OAKS MALL COMPANY, an Ohio Limited Partnership, having an office at 2445 Belmont Avenue, P. O. Box 2186, Youngstown, Ohio 44504 (hereinafter referred to as "Landlord"), and MITCHELL'S FORMAL WEAR, INC., a Georgia Corporation, having an office at 4030C Pleasantdale Road, Atlanta, GA 30340 (hereinafter referred to as "Tenant").

WITNESSETH:

1. Demised Premises

The Landlord hereby demises and leases to the Tenant, and the Tenant hereby rents from the Landlord, the following described premises situated in the City of Paducah, County of McCracken and State of Kentucky:

A one-story room, without basement, having approximate measurements of Thirty and 00/100 --------- (30.00) feet in width, (Center to center of side walls), and Twenty-five and 67/100 ------- (25.67) feet in depth, (Outside of front wall to center of rear wall), located as shown outlined in red on Exhibit C, attached hereto and made a part hereof, to be constructed by Landlord as part of a shopping center known as KENTUCKY OAKS MALL (hereinafter referred to as "Shopping Center"). The Demised Premises are identified as:

UNIT NO. 640 KENTUCKY OAKS MALL Paducah, Kentucky

"Demised Premises", as used in this lease, shall refer to the storeroom described above (but shall not include the roof of the Demised Premises and the area beneath the Demised Premises). Gross area of the Demised Premises shall be the number of square feet of total floor space (including the mezzanine and double-decked storage platforms, if any).

The size, type and shape of the building in which the Demised Premises are located and/or the Shopping Center shall be subject to such changes, enlargements and/or reductions as Landlord at any time deems desirable for the benefit of the

Shopping Center, so long as the location and size of the Demised Premises shall not be substantially changed except as otherwise specifically provided for in this lease.

Landlord shall have the exclusive right to use all or any part of the roof over the Demised Premises and exterior walls of the Demised Premises for any purpose; to erect in connection with the construction there of temporary scaffolds and other aids to construction on the exterior of the Demised Premises, provided that access to the Demised Premises shall not be denied; and to install and use pipes, ducts, conduits and wires leading through the Demised Premises and serving other parts of the Shopping Center in locations which will not materially interfere with Tenant's use thereof. In addition to the foregoing, Landlord may make any use it desires of the side and rear walls of the Demised Premises, provided that there shall be no encroachment upon the interior of the Demised Premises and provided further that the Tenant's access to the Demised Premises shall not be impaired. Landlord hereby reserves the right at any time to make alterations or additions to, and to build additional stories on, the building in which the Demised Premises are contained and to build adjoining the same. Landlord also reserves the right to construct other buildings or improvements in the Shopping Center from time to time and to make alterations thereof or additions thereto and to build additional stories on such building or buildings and to incorporate additional land into the Shopping Center and build thereon and to construct deck or elevated parking facilities.

2. Construction

Landlord and Tenant agree that the construction and improvements of the Demised Premises shall be done as described in Exhibit A entitled "Specifications", attached hereto and made a part hereof. Any work in addition to any of the items specifically enumerated in said Exhibit A shall be performed by the Tenant at its own cost and expense. Any work that is an obligation of Tenant but is done by Landlord on behalf of Tenant, whether or not pursuant to Exhibit A or to this clause, shall be at Tenant's sole cost and expense and will be paid for by Tenant to Landlord based on the cost to Landlord of such work, together with the sum equal to fifteen percent (15%) of said cost for overhead and an additional sum equal to ten percent (10%) of said amount for profit, all due and payable within ten (10) days after billing from Landlord to Tenant.

If Tenant does not submit to Landlord the drawings and

specifications (whether original or revised) required in Exhibit A within the time limits therein set forth, or if Tenant fails to proceed with the work required to be done by Tenant as set forth herein or in Exhibit A, then for purposes of determination of commencement of the term as set forth in Clause 3 hereof, the Demised Premises shall be deemed to be substantially completed by Landlord when so much of such work shall have been substantially completed by Landlord as could then be performed without such drawings and specifications or without such work of Tenant. In any event, Landlord's work shall have been substantially completed when so much as been accomplished as to permit Tenant to enter the Demised Premises to begin any work required to be done by Tenant or to begin fixturing.

Opening for business in the Demised Premises by Tenant shall constitute an acceptance of the Demised Premises and an acknowledgement by Tenant, that the Demised Premises are in the condition required under this lease, except as to deficiencies of which Tenant notifies Landlord in writing prior to opening.

3. Term

TO HAVE AND TO HOLD the Demised Premises for a term of ten (10) lease years, to commence seventy-five (75) days after substantial completion of all of Landlord's work in the Demised Premises in accordance with Clause 2 of this lease, or on the date Tenant opens for business (whichever is sooner).

The first lease year shall be for a period of twelve (12) consecutive calendar months from the commencement date of the lease term, except that if such commencement date shall be other than the first day of a calendar month, the first lease year shall be the period from such commencement date to the end of the calendar month in which it shall occur, plus the following twelve (12) calendar months. Each lease year after the first lease year shall be a successive period of twelve (12) calendar months.

The parties agree that once the commencement date of the term has been established and upon the request of either party, a short form or memorandum of this lease will be executed for recording purposes, which short form or memorandum of lease will set forth the actual commencement and termination dates of the term. Tenant agrees that it shall not record this lease without the written consent of the Landlord. Any fees or other charges levied by any governmental authority, including the cost of recording said short form or memorandum of lease, will be at the expense of the party requesting that said lease be recorded.

If the term of this lease shall not have commenced within five (5) years of the date hereof, then this lease shall automatically become null and void and both parties relieved of all obligations hereunder.

Tenant covenants and agrees that promptly after Landlord delivers possession of the Demised Premises to Tenant, Tenant shall commence and shall proceed with due diligence to make all improvements to and install in the Demised Premises all fixtures and other equipment which may be necessary or proper in the operation of Tenant's business and thereafter to open its store for business.

4. Minimum Rent

Tenant hereby covenants and agrees to pay to the Landlord as minimum annual rental for the Demised Premises, the following:

(a) Commencing with the first (1ST) lease year and continuing to the end of the FIFTH (5TH) lease year of the term of this lease, the sum of FOURTEEN THOUSAND and 04/100 DOLLARS ($14,000.04) per year, payable in equal monthly installments of ONE THOUSAND ONE HUNDRED SIXTY-SEVEN and 67/100 DOLLARS ($1,167.67) each, all in advance on the first day of every calendar month during said period. Landlord shall grant a credit of One Thousand Five Hundred Dollars ($1,500.00) to Tenant's rent obligation above, and apply such to Tenant's rent for the first and second months of the term hereof.

If the term of this lease shall commence on a day other than the first day of the month, Tenant shall pay in advance on said commencement day Minimum Rent equal to one-thirtieth (1/30) of the monthly Minimum Rent multiplied by the number of days in the fractional month for which Tenant is obligated to pay rent.

(b) Commencing with the SIXTH (6TH) lease year and continuing to the end of the TENTH (10TH) lease year of the term of this lease, the sum of SIXTEEN THOUSAND and 08/100 DOLLARS ($16,000.08) per year, payable in equal monthly installments of ONE THOUSAND THREE HUNDRED THIRTY-THREE and 34/100 DOL-

LARS ($1,333.34) each, all in advance on the first day of every calendar month during said period.

5. Percentage Rent

In addition to the payment of Minimum Rent as hereinabove provided, Tenant shall pay to Landlord during each year of the term hereof as Percentage Rent, the following:

(a) Commencing with the first (1ST) lease year and continuing to the end of the FIFTH (5TH) lease year, a sum equal to SIX (6%) percent of all gross sales made in, on or from the Demised Premises during each lease year during said period in excess of $200,000.00, prorated for any period more than a twelve (12) month lease year or less than a twelve (12) month lease year, (hereinafter referred to as "Breakpoint").

(b) Commencing with the SIXTH (6TH) lease year and continuing to the end of the TENTH (10TH) lease year, a sum equal to SIX (6%) percent of all gross sales made in, on or from the Demised Premises during each lease year during said period in excess of $225,000.00, prorated for any period more than a twelve (12) month lease year or less than a twelve (12) month lease year.

In the event the fixed Minimum Rent for any lease year (or partial lease year) shall be reduced or abated for any reason whatsoever, the Breakpoint of gross sales for determining the Percentage Rent shall likewise be reduced proportionately. In the event Tenant ceases to operate its business in the Demised Premises for any reason whatsoever, then the gross sales made in, on, or from the Demised Premises during the lease year in which Tenant ceased to operate its business in the Demised Premises shall equal the amount of gross sales actually made in, on or from the Demised Premises during that lease year multiplied by the fraction having as its numerator 365 and having as its denominator the number of days during that lease year Tenant was actually open for business in the Demised Premises in compliance with Clause 6 of this lease.

Tenant shall submit to the Landlord on or before the fifteenth (15th) day following each monthly period during the term hereof, a written statement of gross sales for the preceding calendar month, such statement to set forth in reasonable, accurate detail the amount of gross sales for said monthly period. Com-

mencing with the month in which the aggregate gross sales for any lease year (or for a partial lease year) shall first exceed the Breakpoint set forth in this Clause 5 (or a proportionate part thereof for a partial lease year) and thereafter, as to all gross sales during the remainder of such lease year (or partial lease year), Tenant shall pay to Landlord Per .entage Rent concurrently with the submission by Tenant of the written statement of gross sales. On or before the last day of the month following the close of each lease year (or partial lease year), Tenant shall furnish to the Landlord a statement certified either by a certified public accountant employed by Tenant or by an officer of Tenant of the gross sales for the preceding lease year (or partial lease year) and shall tender therewith the balance of Percentage Rent due for such lease year (or partial lease year). If the Percentage Rent installments paid by Tenant during any lease year (or partial lease year), exceed the Percentage Rent due for such lease year (or partial lease year), Landlord shall refund said excess amount to Tenant within thirty (30) days after receipt of Tenant's certified statement of gross sales.

"Gross sales", as used herein, shall mean the amount of sales of all merchandise and/or services sold or rendered in, on, about or from the Demised Premises by Tenant or any subtenants, licensees or concessionaires, whether for cash or on a charge, credit or time basis without reserve or deduction for inability or failure to collect, including but not limited to such sales and services: (1) where orders originate at and/or are accepted by Tenant in demised Premises but delivery or performance thereof is made from or at any place other than the Demised Premises; (2) pursuant to mail, telegraph, telephone or other similar orders received or filled at or in Demised Premises; (3) by means of mechanical and other vending machines in the Demised Premises (but this shall not be construed as a consent of Landlord to Tenant's use of such machines); (4) which Tenant in the normal and customary course of business would credit or attribute to its business upon Demised Premises or any part or parts thereof. There shall be deductible from gross sales (to the extent that they are included):

(a) Amounts of refunds, allowances or discounts to customers provided they have been included in gross sales and provided further that if such refunds, allowances or discounts are in the form of credits to customers, such credits shall be included in gross sales when used.

(b) Exchange of merchandise between stores of Tenant where such exchanges are made solely for the operation of Tenant's business and not for the purpose of consummating a sale which has been made at, in, on or from the Demised Premises and / or for the purpose of depriving Landlord of the benefit of such sales which otherwise would have been made at, in or from the Demised Premises.

(c) Returns to shippers and manufacturers for credit.

(d) Sales of trade fixtures or store operating equipment after use thereof in the conduct of Tenant's business in the Demised Premises.

(e) All sums and credits received in settlement of claims for loss or damage to merchandise.

(f) Amount of any excise or sales tax levied upon retail sales and payable over to the appropriate governmental authority, provided that specific record is made at the time of each sale of the amount of sales tax and the amount thereof is expressly charged to the customer.

The Tenant covenants and agrees to keep upon the Demised Premises or at its principal office, books and records in accordance with generally accepted accounting practice, in which shall be recorded gross sales. The books and records of account shall also include all federal, state and local tax returns of Tenant relating to Tenant's sales. Such books and records shall be open to the inspection of the Landlord and Landlord's authorized agents at all reasonable times upon reasonable notice, during business hours at any time during the term of this lease and for a period of at least one (1) year after the termination of this lease. If Landlord shall make an audit of Tenant's records and any such audit shows that the amount of gross sales on Tenant's statement was understated by more than Two Percent (2%) for any calendar year (but prorated for any shorter period), then Tenant (in addition to paying the Percentage Rent due for such understatement) shall pay to Landlord the cost of the audit.

6. Use

Tenant agrees that the Demised Premises shall be occupied by no other person or entity except upon and with the written consent of Landlord first had, and shall be used for the sole purpose of a retail store for the sale and rental of formal wear and related wedding items and apparel. Tenant recognizes that

the specific limited use prescribed herein is a material consideration to Landlord in order that the Shopping Center will maintain an appropriate tenant mix.

Unless otherwise consented to in writing by Landlord, Tenant agrees to conduct its business in the Demised Premises under the name of "MITCHELL'S FORMAL WEAR".

Tenant agrees to keep its Demised Premises adequately illuminated and continuously and uninterruptedly open for business during the same days, nights and hours as any department store or stores located in the Shopping Center and at least, in any event, from the hours of 10:00 a.m. to 9:30 p.m. Monday through Saturday, and shall maintain therein a substantial stock of merchandise and a sufficient number of employees for the purpose of selling said merchandise, unless prevented from doing so by strikes, fire, casualties or other causes beyond Tenant's control. In no event, however, will Tenant open for business after 10:00 p.m. or before 9:00 a.m. on any day without Landlord's consent. Tenant shall be under no obligation to be open on any Sunday.

Tenant agrees that so long as this lease remains in effect, Tenant (or any officer, director or shareholder owning capital stock of Tenant if Tenant be a corporation) will not, either within the Shopping Center (except under lease from Landlord) or within five (5) miles of the Shopping Center, measured from the perimeter of the Shopping Center, directly or indirectly own, operate or be financially interested in, either itself or with others, a business like or similar to the business authorized to be conducted under the terms of this lease. Due to the difficulty in determining the extent to which Landlord would be damaged by reason of loss of Percentage Rent or otherwise in the event that Tenant should breach the foregoing covenant, Tenant agrees that Landlord shall, in addition to any other remedies otherwise available to it, be entitled to add seventy-five percent (75%) of the gross sales (as defined in this lease) from any such location established in violation of the foregoing covenant to the gross sales from the Demised Premises for the determination of Percentage Rent due under Clause 5 thereof. Tenant agrees to furnish to Landlord an annual certified statement of gross sales from any such location(s) in accordance with Clause 5 of this lease.

Tenant further agrees that during the entire term hereof, no part of the Demised Premises shall be abandoned or left vacant unless the Demised Premises have been destroyed by fire or other casualty.

7. Tenant's Additional Agreements

A. Affirmative Obligations

Tenant agrees at its own cost and expense to:

(1) Keep and maintain in a safe, neat and clean condition all portions of its Demised Premises and appurtenances including adjoining areas, storefront, vestibules, entrances and returns, doors, fixtures, windows and plate glass.

(2) Use its best efforts to cause all trucks servicing its Demised Premises to load and unload prior to the hours of opening for business to the general public of the Shopping Center, where reasonably practicable in light of Tenant's business operation.

(3) Cause its employees, officers and agents to park only in such places as provided and designated by the Landlord for employee parking, and specifically, not to permit parking by any of them in any service court area. (Landlord reserves the right to impose fines against Tenant for any violation of these parking restrictions by Tenant or Tenant's employees; Landlord further reserves the right to have towed any automobile parked in violation of this clause.)

(4) Abide by and observe all reasonable rules and regulations established by Landlord from time to time with respect to the operation of the Shopping Center and its Common Areas.

(5) Cooperate fully with the Landlord and other tenants of the Shopping Center in promoting the use of trade names and slogans as may be adopted for the Shopping Center and in all promotional and advertising campaigns.

(6) Advertise with a display-type advertisement a minimum of two (2) times during each lease year with a total of at least one-eighth (1/8) tabloid per lease year in the printed media selected by Landlord or the Merchants Association or Marketing Fund, and pertaining to events sponsored by Landlord or the Merchants Association or Marketing Fund; in the event Tenant fails or refuses to comply with these minimum advertising re-

quirements, Tenant will pay to Landlord an amount equal to the cost of such advertisements, upon demand, said amount to be considered as additional rental for the purposes of this lease. Additionally, Tenant agrees to expend three percent (3%) of its gross sales on local and regional advertising (electronic and paper) in each year.

(7) Keep its display windows and signs electrically lighted during such hours that the Shopping Center is open for business and during such other periods as the Landlord may reasonably prescribe.

(8) Shut off all exhaust fans, if any, servicing the Demised Premises at all times when the Demised Premises are closed; if Tenant's Demised Premises front on an enclosed mall, Tenant shall maintain positive air pressure so as to prevent the drawing of heated or cooled air from the enclosed mall and shall keep the Demised Premises heated or air-conditioned, as the case may be, to at least the same minimum temperature (in the case of heat) or at the same maximum temperature (in the case of air-conditioning) as Landlord shall attempt to maintain in such mall.

(9) Handle and dispose of all trash, rubbish, refuse, garbage and waste in accordance with regulations established by Landlord, use and pay for the services of the designated trash hauler for the Shopping Center, and not permit the accumulation (unless in sealed metal containers) or burning of any trash, rubbish, refuse, garbage or waste materials in, on or about any part of the Shopping Center.

(10) Participate in any reasonable exterminating programs that may be established by Landlord for all or substantially all other stores and businesses in the Shopping Center.

(11) Take no action which would violate Landlord's union contracts, if any, affecting the Shopping Center, nor create any work stoppage, picketing, labor disruption or dispute or any interference

with the business of the Landlord or any tenant or occupant in the Shopping Center or with the right and privileges of any customer or other person lawfully in and upon said Shopping Center, nor cause any impairment or reduction of the good-will of the Shopping Center.

(12) Pay when due all personal property taxes assessed against Tenant's fixtures and furnishings, all taxes arising out of the operation of Tenant's business, and pay for all license fees, occupational taxes and other governmental charges assessed by reason of Tenant's use or occupancy of the Demised Premises; Tenant will permit no lien to attach to the Demised Premises as a result of taxes payable by Tenant.

B. Negative Obligations

Tenant agrees that it shall not, without first obtaining Landlord's consent:

(1) Permit its Demised Premises to be used in any way which will injure the reputation of the same (or of the Shopping Center) or may be a nuisance, annoyance, inconvenience or damage to the tenants of the Shopping Center or of the neighborhood including, without limiting the generality of the foregoing, noise by the playing of any musical instrument or radio or television, or the use of a microphone, loudspeaker, electrical equipment, or utilizing flashing lights or search lights or any other equipment which in the judgment of the Landlord might cause disturbance, impairment or interference with the use or enjoyment by any other tenant in the Shopping Center.

(2) Display any merchandise, solicit business or distribute advertising or promotional matter outside its Demised Premises or in any way obstruct sidewalks or Common Areas adjacent thereto.

(3) Permit deliveries of any kind through the front entrance of its Demised Premises except where no other entrance to the Demised Premises is available.

(4) Permit its Demised Premises to be used for lodging purposes.

(5) Permit any auction sale, fire sale, bankruptcy sale and/or going-out-of-business sale, or similar types of sensational sales promotions to be conducted in the Demised Premises.

(6) Use, occupy, suffer or permit any use of its Demised Premises which would (a) violate any law, ordinance or regulation, (b) constitute a nuisance, (c) constitute an extra-hazardous use, or (d) violate, suspend or void any policy or policies of insurance of either Landlord or any other tenant in the Shopping Center, or increase the cost of such insurance over and above its normal cost.

(7) Subject any fixtures, furnishings or equipment in or on Tenant's Demised Premises which are affixed to the realty to any mortgages, liens, conditional sales agreements, security interests or encumbrances.

(8) Operate on the Demised Premises or in any part of the Shopping Center any coin- or token-operated vending machines or similar devices (including without limitation, pay telephones, pay lockers, pay toilets, scales, amusement devices and machines for the sale of merchandise and/or commodities).

(9) Use any forklift truck, tow truck or any other powered machine for handling freight in the Demised Premises unless the same be powered by electricity.

(10) Place a load on any floor in the Demised Premises or within the interior of the Shopping Center which exceeds the floor load per square foot which such floor was designed to carry, or install, operate or maintain therein any heavy item of equipment except in such manner as to achieve proper distribution of the weight.

8. Signs

Tenant agrees that it will not erect any signs without first obtaining Landlord's approval as to size, color, type and location of the permitted signs, and Tenant agrees that no sign will be

erected unless it meets the standards as set forth in Exhibit B attached hereto and made a part hereof. Tenant agrees not to display any banners, pennants, search lights, window signs, balloons, or similar temporary advertising media. Tenant agrees to maintain its signs in a good state of repair and save the Landlord harmless from any loss, cost or damage as a result of the erection, maintenance, existence or removal of the same and shall repair any damage which may have been caused by the erection, existence, maintenance or removal of such signs. Upon vacating the Demised Premises, the Tenant agrees to remove all signs and repair all damage caused by such removal.

9. Utilities

From the date the work of the Landlord in the Demised Premises is substantially completed, or from the date Tenant begins its work in the Demised Premises, whichever first occurs, Tenant agrees to pay for all utility services rendered or furnished to the Demised Premises including heat, water, electricity, sprinkler charges, fire line charges, sewer rental, sewage treatment facilities and the like, together with all taxes levied or other charges on such utilities and governmental charges based on utility consumption, standby utility capacity or potential utility use. If any such utilities are not separately metered or assessed or are only partly separately metered or assessed and are used in common with other tenants of the Shopping Center, Tenant will pay to Landlord an apportionment of such charges for utilities used in common based on the gross area leased to each tenant using such common facilities, in addition to Tenant's payments of the separately metered charges. If Landlord shall supply any such services, Tenant will purchase same from Landlord at charges not in excess of the charges for the services in question made by any utility corporation or governmental agency supplying such utilities in the area. Any such charges for services supplied by Landlord, or charges for utilities which may be rebilled by the Landlord, shall be due and payable as additional rent within ten (10) days after billings therefor are rendered to Tenant. In no event shall Landlord be liable for the quality, quantity, failure or interruption of such services to the Demised Premises, except where such is due to Landlord's gross negligence or wilful misconduct.

10. Taxes

A. Commencing with the first day of the term of this lease or the date tenant opens for business, whichever first occurs,

Tenant shall thereafter pay Tenant's pro rata share of the Real Estate, Tax Expense which shall include all real estate taxes and assessments both general and special imposed by federal, state or local governmental authority or any other taxing authority having jurisdiction over the Shopping Center, against the land, buildings and all other improvements within the Shopping Center owned or leased by the Landlord, together with any and all expenses incurred by Landlord in negotiating, reviewing, appealing or contesting such taxes and assessments. Real Estate Tax Expense shall include the gross amount of real estate taxes, but such amount shall not be increased by any additional charges or penalties incurred by Landlord due to late payment of real estate taxes nor be reduced by any discount earned by Landlord due to early payment of real estate taxes Tenant's pro rata share shall be computed by multiplying the total of such Real Estate Tax Expense by a fraction whose numerator is the gross area of Tenant's Demised Premises and whose denominator is the number of square feet of total ground floor leasable space within the Shopping Center owned or leased by the Landlord. Tenant hereby waives any right it may have, by statute or otherwise, to protest the real estate taxes and assessments.

Landlord shall estimate Tenant's annual pro rata share of such Real Estate Tax Expense and one-twelfth (1/12) of the amount so estimate shall be paid by Tenant on the first (1st) day of each calendar month in advance. Within ninety (90) days after the end of each tax year, Landlord shall furnish Tenant a statement in reasonable detail of the Real Estate Tax Expense for the prior year and, thereupon, there shall be an adjustment between Landlord and Tenant with payment to or repayment by Landlord, as the case may required, to the end that Landlord shall receive the entire amount of Tenant's annual pro rata share for such period. Any repayment that may be due by Landlord to Tenant may, at Landlord's option, take the form of a credit on Tenant's next succeeding payment or payments pursuant to this clause. If Tenant's pro rata share is greater than the amount paid by Tenant during the prior tax year, Tenant shall pay the Landlord the difference between the amount paid by Tenant and the amount actually due within ten (10) days after receipt of Landlord's statement.

B. It is the intention of the parties hereto that Landlord shall receive the rents and other charges required to be paid to

Landlord by Tenant pursuant to this lease on an absolutely net basis and that Tenant shall, except as specifically provided in this lease to the contrary, pay all costs, expenses and obligations of every kind or nature whatsoever relating to the Demised Premises or any improvements thereon or to the tenancy therein created by this lease, which costs, expenses and obligations may arise or become due during the term of this lease (including any extensions thereof). Therefore, Tenant alone shall be responsible for payment of any type of tax, excise or assessment (regardless of label or whether in the form of a rental tax, gross receipts tax, sales tax, business or occupation tax, use assessment, privilege tax, franchise tax, or otherwise, except any tax, excise or assessment which in substance is a net income or franchise tax that is based solely on Landlord's net income) levied, assessed or imposed at any time by any governmental authority upon or against the Demised Premises, the use or occupancy of the Demised Premises, the rents and other charges payable by Tenant to Landlord, or otherwise with respect to the Landlord-Tenant relationship. Tenant shall pay the full amount of such tax, excise or assessment directly to the appropriate governmental authority, unless the applicable law expressly imposes solely on Landlord the duty to pay or collect such tax, excise or assessment, in which case Tenant shall pay the full amount of such tax, excise or assessment as additional rent under this lease to Landlord, on or before the date when any fine, penalty or interest would be added thereto for nonpayment. Notwithstanding that the applicable law may impose on Landlord the duty to pay or collect such tax, excise or assessment, Landlord shall in no event be obligated by Tenant to pay such tax, excise or assessment and Landlord shall be indemnified against and saved harmless from the same by Tenant. IN the event (i) Tenant fails to timely pay such tax, excise or assessment and Landlord pays the same, or (ii) Landlord elects in its sole discretion to pay the same in advance, Tenant shall promptly reimburse Landlord for the amount thereof (including the fine, penalty or interest, if any) as additional rent under this lease, and such additional rent shall be deemed to be due as of the last date before any fine, penalty or interest would be added to such tax, excise or assessment for nonpayment. The provisions of this paragraph shall also apply to any such tax, excise or assessment which may at any time replace or supplement any tax, excise or assessment described in Section A or B of this clause.

11. Common Area Maintenance

A. Landlord shall make available from time to time within the Shopping Center such Common Areas as and to the extent Landlord shall alone from time to time appropriate. Common Areas shall be defined as including but not limited to any parking areas, driveways, service courts, access and egress roads, sidewalks, opened and enclosed courts and malls, landscaped and planted areas, fire corridors, meeting areas and public restrooms. Landlord shall operate, manage, equip, light, repair and maintain said Common Areas for their intended purposes in such manner as Landlord shall in its sole discretion from time to time determine, and may from time to time change the size, location, elevation, nature and/or use of any Common Areas and may make installations and/or construct, erect, move or remove permanent or temporary improvements therein or thereon, including but not necessarily limited to, buildings, structures, booths and kiosks. Landlord shall have the right to retain revenue from income-producing events whether or not conducted for promotional purposes or by or through the Merchants Association or Marketing Fund.

B. Tenant, its officers, employees, customers and invitees shall have the non-exclusive right in common with Landlord and all others to whom landlord has or may hereafter grant rights, to use said Common Areas as designated by Landlord subject to such rules and regulations as Landlord may impose. Landlord may at any time close any Common Area to make repairs or changes or prevent the acquisition of public rights in such area or to discourage non-customer parking.

C. Tenant shall pay to Landlord for Landlord's operating, maintaining and repairing said Common Areas, an annual amount equal to Three and 50/100 Dollars ($3,50) per square foot of gross area of Tenant's Demised Premises per calendar year, on a prorated basis for any period less than a full calendar year. Said amount shall be considered as additional rent and subject to all of the provisions of this lease as to default in the payment of rent and shall be payable within thirty (30) days after the commencement of this lease or the date the Tenant opens for business, whichever first occurs, and within thirty (30) days after the commencement of each calendar year thereafter. Regardless of the gross area of the Demised Premises, Tenant's payment hereunder will not be less than Three Thousand & 00/100 Dollars ($3,000.00) in any calendar year.

12. Maintenance

Landlord covenants and agrees to keep and maintain, at its own cost and expense (except as hereinafter set forth), the roof and other exterior portions of the Demised Premises and the plumbing, sewage and utility lines outside the building in which the Demised Premises are located, and to make any structural repairs in the interior of the Demised Premises; except, however, that Landlord shall not be responsible for the following, even if exterior or structural: storefront, doors, door frames, door checks and operators and windows; reasonable wear and tear; damage caused by any act or negligence of Tenant, its employees, agents, invitees, licensees or contractors; such structural or exterior portions not originally constructed by the Landlord; and any structural or exterior portions of the Demised Premises abutting an open or enclosed mall. Other than as herein provided, Landlord shall not be responsible to make any other improvements or repairs of any kind in or upon the Demised Premises.

Tenant covenants and agrees to keep and maintain at its own cost and expense in good order, condition and repair the Demised Premises and every part thereof, except as hereinbefore provided, including, but without limitation, the exterior and interior portions of all doors, door frames, door checks and operators, windows, plate glass and showcases surrounding the Demised Premises, all plumbing and sewage facilities, and electrical systems within or beneath the Demised Premises, servicing Premises, fixtures, heating, air-conditioning and electrical equipment, and interior walls, floors and ceilings, signs and all interior building appliances and similar equipment, and any portions of the roof and other exterior areas of the Demised Premises which have been altered by the Tenant. Tenant further agrees to replace any of said equipment servicing Premises when necessary at its own cost and expense.

Tenant shall promptly comply with all present and future laws, regulations or rules of any county, state, federal and other governmental authority and any bureau and department thereof, and of the National Board of Fire Underwriters or any other body exercising similar function which may be applicable to the Demised Premises, including the making of any required structural changes thereto, except where Landlord is obligated as to such under this Lease.

If Tenant refuses or neglects to commence or complete said repairs or changes promptly and adequately, Landlord may, but shall not be required to do so, make or complete said repairs or

changes and Tenant shall pay the cost thereof to Landlord upon demand, together with the sum equal to fifteen percent (15%) of said costs for overhead and an additional sum equal to ten percent (10%) of said amount for profit, all due and payable within ten (10) days after billing from landlord to Tenant.

13. Surrender of Demised Premises

Tenant covenants and agrees to deliver up and surrender to the Landlord the possession of the Demised Premises upon the expiration of this lease or its earlier termination, as herein provided, in as good condition and repair as the same shall be at the commencement of said term or may have been put by the Landlord during the continuance thereof -- ordinary wear and tear and damage by fire or the elements, excepted. Nothing herein shall be construed as relieving the Tenant of any of its obligations under the provisions of Clause 12 above.

14. Property in the Demised Premises

Except as to Tenant's trade fixtures, all leasehold or building improvements, including without limitation carpeting and padding, fluorescent light fixtures and heating and air-conditioning equipment, and all construction work done by the Tenant or prior tenants attach to the freehold when installed or completed and shall be the property of the Landlord, unless abandoned in writing by Landlord, in which event Tenant shall assume ownership of and responsibility for same. Tenant shall not remove, destroy or alter any leasehold or building improvement without first giving adequate prior written notice to Landlord who shall have the right to demand that Tenant salvage and deliver to Landlord, at the expense of Tenant, any existing improvement or construction work. All store fixtures or trade fixtures and signs shall remain the property of the Tenant subject at all times to a security interest in favor of Landlord to secure Landlord's claim for rent and other sums which may become due to the Landlord under this lease, subordinate to the interests of inventory finance Lender of Tenant, i.e., Trust Company Bank, Atlanta, Georgia.

Tenant further agrees that all personal property of every kind or description which may at any time be in the Demised Premises shall be at the Tenant's sole risk, or at the risk of those claiming under the Tenant. Landlord shall not be responsible or liable to Tenant for any loss or damage that may be occasioned by the acts or omissions of persons occupying any space adjacent to or adjoining Tenant's Demised Premises, or any part thereof.

Except for its gross negligence, Landlord shall not be responsible or liable to Tenant for any loss or damage resulting to Tenant or its property from roof leaks, water, gas, steam, fire, or the bursting, stoppage or leaking of sewer pipes, or from the heating or plumbing fixtures, or from electric wires, or from gas or odors, or caused in any manner whatsoever.

15. Alterations

Tenant further covenants not to permit structural or exterior alterations of or upon any part of the Demised Premises except by and with the written consent of the Landlord first had. All alterations and additions to the Demised Premises shall be made in accordance with all applicable laws, ordinances and regulations and shall remain for the benefit of the Landlord and the Tenant further agrees, in the event of making such alterations as herein provided, to indemnify and save harmless the Landlord from all expenses, liens, claims or damages to either persons or property or the Demised Premises, arising out of or resulting from the undertaking or making of said alterations or additions.

16. Assignment and Subletting

Tenant covenants and agrees not to assign this lease or to sublet the whole or any part of the Demised Premises, or to permit any other persons to occupy same, references elsewhere herein to assignees notwithstanding. Any assignment or subletting, even with the consent of Landlord, shall not relieve Tenant from liability for payment of rent or other sums herein provided or for the obligation to keep and be bound by the terms, conditions and covenants of this lease, notwithstanding the fact that this lease may be amended by agreement between such assignee or subtenant and Landlord. In the event any assignment or subletting, even with the consent of Landlord, results in rental income or other lease charges in an amount greater than that provided for in this lease, then such excess shall belong to the Landlord and shall be payable to Landlord as additional rental herein reserved. The acceptance of rent from any other person shall not be deemed to be a waiver of any of the provisions of this lease or to be a consent to the assignment of this lease or subletting of the Demised Premises.

Notwithstanding anything to the contrary contained in this Clause 16, Landlord shall not unreasonably withhold its consent to any assignment of this lease unless Landlord shall have a reasonable basis for withholding such consent, such as, but not limited to, the financial responsibility, the merchandising ability

and practices, and the general desirability (character and reputation) of the proposed assignee, and if the net worth of the proposed assignee shall be at least equal to or the greater of (i) the net worth of the Tenant as of the date of this lease, or (ii) the net worth of the Tenant immediately preceding the date of such assignment. Any such assignment shall be upon and subject to all of the covenants, provisions and conditions contained in this lease, all of which shall be assumed by any such assignee by a written instrument satisfactory to Landlord, and such assignment shall not relieve the Tenant of or from any of its obligations under this lease.

An assignment for the benefit of creditors or by operation of law shall not be effective to transfer any rights to assignee without the written consent of the Landlord first having been obtained.

Provided Tenant is a corporation, then if at any time during the term of this lease any part or all of the corporate shares of Tenant shall be transferred by sale, assignment, operation of law or other disposition so as to result in a change in the present effective voting control of Tenant by the person or persons owning a majority of said corporate shares on the date of this lease, excluding transfers between existing shareholders. Tenant shall promptly notify Landlord in writing of such change, and Landlord may terminate this lease at any time after such change in control by giving Tenant ninety (90) days' prior written notice of such termination.

17. Holding Over

If the Tenant shall remain in possession of all or any part of the Demised Premises after the expiration of the term of this lease or any renewal thereof, then the Tenant shall be deemed a tenant of the Demised Premises from month to month at one hundred fifty percent (150%) of the Minimum Rent, Common Area Maintenance and Insurance charges payable during the last year of the term of this lease or any renewal thereof, and subject to all of the terms and provisions hereof, except only as to the term of this lease.

18. Access to Demised Premises

Tenant further agrees to permit the Landlord's agents to inspect or examine the Demised Premises at any reasonable time upon reasonable notice (except in an emergency), and to permit the Landlord to make such repairs to the building of which the Demised Premises are a part that the Landlord may deem desir-

able or necessary for its preservation and which the Tenant has not covenanted herein to do or has failed so to do.

Tenant further agrees that on and after ninety (90) days next preceding the expiration of the term of this lease the Landlord or its agents shall have the right to show the Demised Premises to potential tenants, and to place notices offering the Demised Premises "To Let" or "For Sale" on the front of the Demised Premises or any part thereof.

19. Trade Fixtures

Tenant may, at the expiration of said term, remove all the Tenant's trade fixtures which can be removed without costly injury to, or undue defacement of the Demised Premises, provided all rents stipulated are paid in full and Tenant is not otherwise in default hereunder, and that any and all damage to Demised Premises or to Landlord's premises (resulting from or caused by such removal) shall be promptly repaired at Tenant's expense.

20. Quiet Enjoyment

Landlord covenants and agrees that if the Tenant shall perform all of the covenants and agreements herein stipulated to be performed on the Tenant's part, the Tenant shall, at all times during said term, have the peaceable and quiet enjoyment and possession of the Demised Premises without any manner of hindrance from the Landlord or any persons lawfully claiming through the Landlord.

21. Insurance

A. Tenant covenants and agrees to obtain and have in force upon mutual execution and delivery of this lease, and to keep in force continuously thereafter until the expiration of the entire term of this lease: (1) comprehensive general liability insurance relating to the Demised Premises and its appurtenances on an occurrence basis with minimum limits of liability in amounts of Two Hundred Fifty Thousand Dollars ($250,000) for bodily injury, personal injury or death to any one person, Five Hundred Thousand Dollars ($500,000) for bodily injury, personal injury or death to more than one person, and Five Hundred Thousand Dollars ($500,000) with respect to damage to property by water or otherwise; (2) fire and extended coverage, vandalism, malicious mischief and special extended coverage insurance in an amount adequate to cover the cost of replacement of all leasehold or building improvements in the Demised Premises which were

originally constructed by Tenant, as well as the cost of replacement of all fixtures, equipment, decorations, contents and personal property therein; (3) plate glass insurance with respect to all plate and other glass in the Demised Premises; and (4) if there is a boiler or air-conditioning equipment in, on, adjoining or beneath the Demises Premises, broad form, boiler or machine insurance in the amount of One Hundred Thousand Dollars ($100,000). Tenant agrees to deliver to Landlord, at least fifteen (15) days prior to the time such insurance is first required to be carried by Tenant, and thereafter at least fifteen (15) days prior to the expiration of any such policy, either a duplicate original or a certificate and true copy of all policies procured by Tenant in compliance with its obligations hereunder, together with evidence of payment therefor and including an endorsement which states that such insurance may not be cancelled except upon ten (10) days' written notice to Landlord and any designee(s) of Landlord.

B. All of the aforesaid insurance shall be written by one (1) or more responsible insurance companies satisfactory to Landlord; all such insurance may be carried under a blanket policy covering the Demised Premises and any other of Tenant's stores and shall contain endorsements that: (1) such insurance may not be canceled or amended with respect to Landlord (or its designee[s]), except upon ten (10) days' written notice by registered mail to Landlord (and such designee[s]) by the insurance company; and (2) Tenant shall be solely responsible for payment of premiums for such insurance. In the event Tenant fails to furnish such insurance, the Landlord may obtain such insurance and the premiums shall be deemed additional rent to be paid by Tenant to the Landlord upon demand. It is further agreed that any statements made in this section concerning minimum insurance requirements cannot be construed by the Tenant as indicating either the adequacy or sufficiency of insurance required for the Tenant's purposes, nor shall such requirements be used to define the responsibility of the Tenant to repair, restore or replace as otherwise covered in this lease.

C. The minimum limits of the comprehensive general liability policy of insurance shall in no way limit or diminish Tenant's liability under Section D hereof and shall be subject to increase at any time, and from time to time, after the commencement of the fifth (5th) year of the term hereof if Landlord in the exercise of its reasonable judgment shall deem same necessary for adequate protection. Within thirty (30) days after demand therefor by Landlord, Tenant shall furnish Landlord with evidence

that such demand has been complied with.

D. Tenant will defend, indemnify and save Landlord harmless from and against any and all claims and demands in connection with any accident, injury or damage whatsoever caused to any person or property arising directly or indirectly out of the business conducted in the Demised Premises or occurring in, on or about the Demised Premises or any part thereof, or arising directly or indirectly from any act or omission of Tenant or any concessionaire or subtenant or their respective licensees, servants, agents, employees or contractors, and from and against any and all costs, expenses and liability incurred in connection with any such claim or proceeding brought thereon. The comprehensive general liability coverage maintained by Tenant pursuant to Section A above shall specifically insure the contractual obligations of Tenant as set forth herein.

E. Tenant agrees, at its own cost and expense, to comply with all of the rules, regulations and recommendations of the Fire Insurance Rating Organization having jurisdiction and any similar body. If at any time and from time to time, as a result of or in connection with any failure by Tenant to comply with the foregoing sentence or any act of omission or commission by Tenant, its employees, agents, contractors or licensees, or as a result of or in connection with the use to which the Demised Premises are put (notwithstanding that such use may be for the purposes hereinbefore permitted or that such use may have been consented to by Landlord), the fire insurance rate(s) applicable to the Demised Premises, or the building in which same are located, or to any other premises in said building, or to any adjacent property owned or controlled by Landlord, or an affiliate of Landlord, and/or to the contents in any or all of the aforesaid properties shall be higher than that which would be applicable for the lease hazardous type of occupancy legally permitted therein, Tenant agrees that it will pay to Landlord, on demand, as additional rental, such portion of the premiums for all fire insurance policies in force with respect to the aforesaid properties and the contents of any occupant thereof as shall be attributable to such higher rate(s). If Tenant installs any electrical equipment that overloads the lines in the Demised Premises or the building which the Demised Premises are located, Tenant shall, at its own cost and expense, promptly make whatever changes are necessary to remedy such condition and to comply with all requirements of the Landlord and the Board of Fire Insurance Underwriters and any similar body and any governmental authority having jurisdiction thereof.

For the purpose of this paragraph, any finding or schedule of the Fire Insurance Rating Organization having jurisdiction thereof shall be deemed to be conclusive. In the event that this lease so permits and Tenant engages in the preparation of food or packaged foods or engages in the use, sale or storage of inflammable or combustible material, Tenant shall install chemical extinguishing devices (such as ansul) approved by the Fire Insurance Rating Organization and shall keep such devices under service as required by such organization. If gas is used in the Demised Premises, Tenant shall install gas cutoff devices (manual and automatic).

F. Each insurance policy carried by Landlord or Tenant and insuring all or any part of the Shopping Center, the Demised Premises, including improvements, alterations and changes in and to the Demised Premises made by either of them and Tenant's trade fixtures therein, shall be written in a manner to provide that the insurance company waives all right of recovery by way of subrogation against Landlord or Tenant as the case may be, in connection with any loss or damage to the Demised Premises property or businesses caused by any of the perils covered by fire and extended coverage, building and contents, and business interruption insurance, or for which either party may be reimbursed as a result of insurance coverage affecting any loss suffered by it; provided, however, that the foregoing waivers shall apply only to the extent of any recovery made by the parties hereto under any policy of insurance now or hereafter issued. So long as the policy or policies involved can be so written and maintained in effect, neither Landlord nor Tenant shall be liable to the other for any such loss or damage. In the event of inability on the part of either party to obtain such provision in its policy or policies with the carrier with whom such insurance is then carried, or such carriers requiring payment of additional premium for such provision, the party so affected shall give the other party written notice of such inability or the increase in premium as the case may be. The party to whom such notice is given shall have fifteen (15) days from the receipt thereof within which: (1) in the case of such inability on the part of the other carrier, to procure from the aforesaid party's insurance carrier in writing, at no increase in premium over that paid theretofore by the party so affected, such waiver of subrogation; (2) in the case of increased premium, to pay the party so affected the amount of such increase; (3) to waive, in writing, within the time limit set forth herein, such requirement to obtain the aforesaid waiver of subrogation. Should the party to

whom such notice is given fail to comply as aforesaid within the said fifteen (15) day period, each and every provision in this paragraph in favor of such defaulting party shall be cancelled and of no further force and effect. It is further agreed that no right of recovery shall be waived by a party if that party has elected, within the scope of this agreement, to self-insure (in whole or in part and to the extent of such self-insurance) as respects any insurance required herein, if damages sustained are deemed to be a result of negligence on the part of Landlord or Tenant.

G. Landlord agrees to maintain: (1) comprehensive general liability insurance relating to the Shopping Center and its Common Areas on an occurrence basis in the minimum amount of One Million Dollars ($1,000,000); (2) fire and extended coverage, vandalism, malicious mischief and special extended coverage insurance to the extent of the replacement value of the Shopping Center buildings and improvements originally constructed by Landlord. Tenant agrees to pay to Landlord, as its share of Landlord's general insurance costs and expenses, an annual amount equal to twenty cents (20¢) per square foot of gross area of Tenant's Demised Premises per calendar year (but not less than One Hundred Fifty & 00/100 Dollars [$150.00] per calendar year), to be adjusted annually upward or downward, but never less than the above amount, in directed proportion to the increase or decrease of the annual cost and expense to Landlord for such insurance from the date of this lease to the annual period in question. Said amount to be paid by Tenant shall be considered as additional rent and subject to all of the provisions of this lease as to default in the payment of rent and shall be payable within thirty (30) days after the commencement of this lease or the date the Tenant opens for business, whichever first occurs, and within thirty (30) days of the commencement of each calendar year thereafter.

22. Eminent Domain

A. If the whole of the Demised Premises, or such portion thereof as to render the remainder unsuitable for the purposes for which the Demised Premises were leased, be taken or condemned for any public or quasi-public use or purposes by any competent authority in appropriation proceedings or by any right of eminent domain, then this lease shall cease and terminate from the time possession thereof is required for public use. Any dispute under the provisions of this paragraph shall be submitted to the American Arbitration Association in accordance with its procedures at such time, which determination shall be binding upon the

parties hereto.

B. If any part of the Demised Premises shall be so taken and this lease shall not terminate under the provisions of Section A above, then Landlord at its own expense, shall repair and restore the portion not affected by the taking and thereafter the Minimum Rent to be paid by Tenant shall be equitably and proportionately adjusted. The repair and restoration work of Landlord shall not, however, exceed the scope of the work required to be done by Landlord in originally constructing Tenant's Demised Premises and the cost thereof shall not exceed the net proceeds of the condemnation award actually received and retained by Landlord.

C. All compensation awarded or paid upon such a total or partial taking shall belong to and be the property of Landlord without participation by Tenant and without any deduction therefrom for any present or future estate of Tenant. Tenant shall, however, be entitled to claim, prove and receive in such condemnation proceedings, such award as may be allowed for loss of business and for fixtures and other equipment installed by Tenant, provided that no such claim of Tenant shall diminish or otherwise adversely affect Landlord's award or the award of any and all ground and underlying lessors and mortgagees.

23. Fire or Other Casualty

A. Should the Demised Premises (or any part thereof) be damaged or destroyed by fire or other casualty insured under the standard fire and casualty insurance policy with approved standard extended coverage endorsement applicable to the Demised Premises, Landlord shall, except as otherwise provided herein, and to the extent it recovers proceeds from such insurance, repair and/or rebuild the same with reasonable diligence. Landlord's obligation hereunder shall be limited to the building and improvements originally provided by Landlord when the Demised Premises were originally constructed. Landlord shall not be obligated to repair, rebuild or replace any property belonging to Tenant or any improvements to the Demised Premises furnished by Tenant. Unless this lease is terminated by Landlord as hereinafter provided, Tenant shall, at its cost and expense, repair, restore, redecorate and refixture the Demised Premises and restock the contents thereof in a manner and to at least a condition equal to that existing prior to such damage or destruction, except for the building and improvements to be reconstructed by landlord as above set forth, and the proceeds of all insurance carried by Tenant on the prop-

erty, decorations and improvements as well as fixtures and contents in the Demised Premises shall be expended by Tenant for such purposes. In the event the Demised Premises are completely or partially destroyed or so damaged by fire or other casualty and this lease is not terminated as hereinafter provided, there shall be no abatement of rent; it being understood and agreed that the Tenant shall, at its sole discretion, cost and expense, procure necessary insurance to protect itself against any interruption of its business.

B. Notwithstanding anything to the contrary contained in the preceding Section A or elsewhere in this lease, Landlord at its option may terminate this lease on thirty (30) days' notice to Tenant, given within ninety (90) days after the occurrence of any damage or destruction if (1) the Demised Premises be damaged or destroyed as a result of a risk which is not covered by Landlord's insurance, or (2) the Demised Premises be damaged and the cost to repair the same shall be more than twenty-five percent (25%) of the cost of replacement thereof, or (3) the Demised Premises be damaged during the last three (3) years of the term, or (4) the building of which the Demised Premises are a part shall be damaged to the extent of twenty-five percent (25%) or more of the then monetary value thereof (whether the Demised Premises be damaged or not), or (5) if any or all of the buildings or Common Areas of the Shopping Center are damaged (whether or not the Demised Premises are damaged) to such an extent that, in the sole judgment of Landlord, the Shopping Center cannot be operated as an integral unit.

C. Except to the extent specifically provided for in this lease, none of the rentals payable by Tenant, nor any of Tenant's other obligations under any provisions of this lease, shall be affected by any damage to or destruction of the Demised Premises by any cause whatsoever, and Tenant hereby specifically waives any and all additional rights it might otherwise have under any law or statute.

24. Default by Tenant

In the event:

(a) Tenant shall fail to pay any rental or other charges when due hereunder and such default continues for more than ten (10) days; or

(b) Tenant shall fail to observe or perform any of the other terms, conditions or covenants of this lease to be observed or performed by Tenant and such default continues for more than ten (10) days; or

(c) Tenant or an agent of Tenant shall falsify any report required to be furnished to Landlord pursuant to the terms of this lease; or

(d) Tenant or an agent of Tenant shall suffer this lease to be taken under any writ of execution,

then Landlord, besides other rights or remedies it may have, shall have the immediate right to terminate this lease, in which event Tenant shall have no further right, title or interest in or to either the Demised Premises or this lease, or to reenter and attempt to relet without terminating this lease and, in either event, to remove all persons and property from the Demised Premises and store such property in a public warehouse or elsewhere at the cost of and for the account of Tenant, all without demand, service of notice or resort to legal process and without being deemed guilty of trespass or becoming liable for any loss or damage which may be occasioned thereby. Notwithstanding any provision of this lease to the contrary, Landlord, at its option, may, without terminating this lease or affecting Tenant's obligation to pay Percentage Rent and other charges equivalent to rent, declare the entire amount of Minimum Rent for the remainder of the term of this lease immediately due and payable and collect such amount by any lawful procedure.

If at any time after the execution of this lease, Tenant or any Guarantor of this lease shall commence, in any court pursuant to any statute either of the United State or of any State, an insolvency or bankruptcy proceeding (including, without limitation, a proceeding for liquidation, reorganization or for adjustment of debts of an individual with regular income), or if such a proceeding is commenced against Tenant or any Guarantor of this lease and either an order for relief is entered against such party or such party fails to secure a discharge of the proceeding within thirty (30) days of the filing thereof, or if Tenant or any Guarantor of this lease becomes insolvent or is unable or admits in writing its inability to pay its debts as they become due, or makes an assignment for the benefit of creditors or petitions for or enters into an arrangement with its creditors or a custodian is appointed or takes possession of Tenant's or any Guarantor's property, whether or not a judicial proceedings is instituted in connection with such arrangement or in connection with the appointment of such custodian (each of the foregoing events are hereinafter referred to as an "act of bankruptcy"), then Landlord, besides other rights or remedies it may have, shall have the immediate right to terminate this lease or

reenter and attempt to relet without terminating this lease and remove all persons and property from the Demised Premises and such property may be removed and stored in a public warehouse or elsewhere at the cost of, and for the account of, Tenant, all without service of notice or resort to legal process and without being deemed guilty of trespass, or becoming liable for any loss or damage which may be occasioned thereby and Landlord may retain as liquidated damages any rent or money received by Landlord from Tenant or others on behalf of Tenant. In the event of a proceeding involving Tenant under the Bankruptcy Code, 11 U.S.C. 101 et seq., if this lease is assumed by Tenant's trustee in bankruptcy (after he has cured all existing defaults, compensated Landlord for any loss resulting therefrom and provided adequate assurance of future performance), then this lease may not be assigned by the trustee to a third party, unless such party (i) executes and delivers to Landlord an agreement in recordable form whereby such party assumes and agrees with Landlord to discharge all obligations of Tenant under this lease, including, without limitation the provisions of Clause 6 relating to the permitted use of the Demised Premises and the manner of operation thereof; (ii) has a net worth and operating experience at least comparable to that possessed by Tenant named herein and any Guarantor of this lease as of the execution of this lease; and (iii) grants Landlord, to secure the performance of such party's obligations under this lease, a security interest in such party's merchandise, inventory, personal property, fixtures, furnishings, and accounts receivable (and in the proceeds of all of the foregoing) with respect to its operations in the Demised Premises, and in connection therewith, such party shall execute such security agreements, financing statements and other documents (the forms of which are to be designated by Landlord) as are necessary to perfect such lien.

If Landlord, without terminating this lease, either (i) elects to reenter and attempts to relet, as hereinbefore provided, or (ii) takes possession pursuant to legal proceedings, or (iii) takes possession pursuant to any notice provided by law, then it may, from time to time, make such alterations and repairs as may be necessary in order to relet the Demised Premises or any part thereof for such term or terms (which may be for a term extending beyond the term of this lease) and at such rental or rentals and upon such other terms and conditions as Landlord in its sole discretion may deem advisable. Upon each such reletting, all rentals received by Landlord from such reletting shall be applied, first, to the payment of any indebtedness other than rent due

hereunder from Tenant to Landlord; second, to the payment of any costs and expenses of such reletting, including brokerage fees and reasonable attorney fees; third, to the payment of rent due and unpaid hereunder, and the residue, if any, shall be held by Landlord and applied to payment of future rent as the same may become due and payable hereunder. If such rentals received from such reletting during any month be less than that to be paid during that month by Tenant hereunder, Tenant shall pay any such deficiency to Landlord. Such deficiency shall be calculated and paid monthly. No such reentry or taking possession of the Demised Premises by Landlord shall be construed as an election to forfeit its right to receive rental and other sums pursuant to this lease unless a notice of such intention be given to Tenant. Notwithstanding any such reletting without termination, Landlord may at any time thereafter elect to terminate this lease for such previous breach.

Should Landlord at any time terminate this lease for any breach, in addition to any other remedies which it may have, it shall have the right to recover from Tenant compensation for and reimbursement of all damages and expenses, including reasonable attorney fees and the cost of recovering the Demised Premises, that Landlord has sustained or will sustain because of Tenant's default.

In addition to any other remedies Landlord may have at law or in equity and/or under this lease, Tenant shall pay upon demand all Landlord's costs, charges and expenses, including fees of counsel, agents and others retained by Landlord, incurred in connection with the recovery of sums due under this lease, or because of the breach of any covenant under this lease or for any other relief against Tenant. In the event Tenant shall bring any action against Landlord for relief hereunder and Landlord shall prevail, Tenant shall pay Landlord's reasonable attorney fees an all court costs. If Tenant shall be compelled to file litigation to enforce Landlord's obligations and shall prevail, Tenant shall be entitled to recover its reasonable attorneys fees.

No waiver of any covenant or condition or of the breach of any covenant or condition of this lease shall be taken to constitute a waiver of any subsequent breach of such covenant or condition nor to justify or authorize the nonobservance on any other occasion of the same or of any other covenant or condition hereof, nor shall the acceptance of rent by Landlord at any time when Tenant is in default under any covenant or condition hereof, be construed as a waiver of such default or of Landlord's right to terminate this lease on account of such default, nor shall any waiver or indul-

gence granted by Landlord to Tenant be taken as an estoppel against Landlord, it being expressly understood that if at any time Tenant shall be in default in any of its covenants or conditions hereunder, an acceptance by Landlord of rental during the continuance of such default or the failure on the part of Landlord promptly to avail itself of such other rights or remedies as Landlord may have, shall not be construed as a waiver of such default, but Landlord may at any time thereafter, if such default continues, terminate this lease on account of such default or otherwise avail itself of the remedies hereinbefore provided.

Landlord, Tenant and Guarantor, if any, covenant and agree, because of the difficulty or impossibility of determining Landlord's damages, should Tenant (i) fail to take possession of and open for business in the Demised Premises in accordance with the terms of this lease; or (ii) vacate, abandon or desert the Demised Premises; or (iii) cease operating Tenant's business therein (except where the Demised Premises are rendered untenantable by reason of fire, casualty or other causes beyond Tenant's control not resulting from negligent acts or omissions of Tenant or Tenant's employees, agents, contractors, licensees, concessionaires or invitees); or (iv) fail or refuse to maintain the business hours, days or nights or any part thereof as provided in Clause 6 hereof, then, in any of such events (hereinafter referred to as "failure to do business"), Landlord, at its option, shall have the right:

(a) to collect not only the fixed annual Minimum Rent and other rentals and charges herein reserved, but also to collect an additional amount equal to one-half of the total of (1) all other rentals and charges set forth herein plus (2) the greatest amount of any Percentage Rent payable by Tenant in any lease year pursuant to Clause 5; said additional amount shall be payable for the period of Tenant's failure to do business, computed at a daily rate each and every day during such period, and such additional amount shall be deemed to be liquidated damages for such period; and/or

(b) to treat such failure to do business as a default.

As used herein, the term "vacate", "abandon", or "desert" shall not be defeated because Tenant may have left all or any part of its trade fixtures or other personal property in the Demised Premises.

The rights and remedies given to Landlord by this lease shall be deemed to be cumulative and no one of such rights and remedies shall be exclusive at law or in equity of the rights and remedies which Landlord might otherwise have by virtue of a

default under this lease, and the exercise of one such right or remedy by Landlord shall not impair Landlord's standing to exercise any other right or remedy against Tenant or any Guarantor. Landlord, Tenant and Guarantor, if any, shall and do hereby waive trial by jury in any action, suit or proceeding related to, rising out of or in connection with the terms, conditions and covenants of this lease.

25. Right of Redemption and Counterclaim

The Tenant, for itself and for all persons claiming through or under it, hereby expressly waives any and all rights which are or may be conferred upon the Tenant by any present or future law to redeem the Demised Premises, or to any new trial in any action of ejection under any provision of law, after reentry thereupon, or upon any part thereof, by the Landlord, or after any warrant to dispossess or judgment in ejection. If the Landlord shall acquire possession of the Demised Premises by summary proceedings, or in any other lawful manner without judicial proceedings, it shall be deemed a reentry within the meaning of that word as used in this lease. In the event that the Landlord commences any summary proceedings or action for nonpayment of rent or other charges provided for in this lease, the Tenant shall not interpose any defense of improper venue or counterclaim of any nature or description in any such proceeding or action.

26. Past-Due Rent

If Tenant shall fail to pay, when the same is due and payable, any Minimum Rent or any Percentage Rent or other amounts or charges to be paid to Landlord by Tenant as provided in this lease, such unpaid amounts shall bear interest from the due date thereof to the date of payment at the rate which is the lesser of eighteen percent (18%) per annum or the maximum interest rate permitted by law.

27. Accord and Satisfaction

No payment by Tenant or receipt by Landlord of a lesser amount than the monthly rent herein stipulated shall be deemed to be other than on account of the earliest stipulated rent, nor shall any endorsement or statement on any check or any letter accompanying any check or payment as rent be deemed an accord and satisfaction, and Landlord may accept such check or payment without prejudice to Landlord's right to recover the balance of such rent or pursue any other remedy in the lease provided.

In the event this lease requires Tenant to submit payments monthly for items other than the Minimum Rent (examples – maintenance contributions, insurance payments and real estate tax payments) and in the event Tenant submits a payment of less than the total combined amount of all of said payments, then the Landlord shall have the option to credit said payment towards any of said items it so desires, notwithstanding any specification of Tenant.

28. Reciprocal Construction and/or Easement Agreement

This lease is subject and subordinate to any reciprocal construction and/or easement agreement between Landlord and any other party or parties which now exist or which may hereafter exist during the term of this lease and all extensions and renewals thereof. The provisions of this clause shall be self-operative; however, Tenant, upon request of any party in interest, shall execute promptly such agreements or instruments to effectuate the intent of this clause. Nothing contained in this clause shall materially adversely affect any of the rights granted to Tenant under this lease.

Further, Landlord reserves the right to sever the ownership of or title to the various sections of the Shopping Center and/or to place separate mortgages on said sections, in which case the rights of Tenant will be preserved by a written declaration, to be executed by the Landlord and duly recorded, creating mutual, reciprocal and interdependent rights to use the parking and other Common Areas and the utilities and facilities needed for the full use and enjoyment of the Demised Premises by Tenant and without impairing any of the duties and obligations of the Landlord to the Tenant under this lease. Tenant covenants to execute from time to time such instruments reasonably required by Landlord and/or its mortgagee to effectuate the provisions of this clause.

29. Tenant's Certificate

Tenant agrees, at any time within ten (10) days of Landlord's written request, to execute, acknowledge and deliver to Landlord a written statement in form requested by Landlord, certifying that this lease is unmodified and in full force and effect (or, if there have been modifications, that this lease is in full force and effect as modified and stating the modifications), and the dates to which the Minimum Rent and other charges have been paid in advance, if any, or whether or not there are then existing any set

offs or defenses against the enforcement of any of the agreements, terms or conditions hereof upon the part of Tenant to be performed or complied with (and, if so, specifying the same), it being intended that any such statement delivered pursuant to this clause may be relied upon by any prospective purchaser or mortgagee of the Shopping Center or any part thereof.

30. Subordination

The Landlord reserves the right and privilege to subject and subordinate this lease at all times to the lien of any mortgage or mortgages now or hereafter placed upon the Landlord's interest in the Demised Premises and on the land and buildings of which the Demised Premises are a part, or upon any buildings hereafter placed upon the land of which the Demised Premises are a part, and to any and all advances to be made under such mortgages, and all renewals, modifications, extensions, consolidations and replacements thereof.

Tenant covenants and agrees to execute and deliver, upon demand, such further instrument or instruments subordinating this lease on the foregoing basis to the lien of any such mortgage or mortgages as shall be desired by the landlord and any mortgagees or proposed mortgagees, and hereby irrevocably appoints Landlord the attorney-in-fact of Tenant to execute and deliver such instrument or instruments for and in the name of Tenant in the event Tenant shall fail to execute such instrument or instruments within ten (10) days after written notice to do so.

Tenant shall in the event of the sale or assignment of Landlord's interest in the Shopping Center, or in the event of any proceedings brought for the foreclosure of, or in the event of the exercise of the power of sale under any mortgage covering the Shopping Center, attorn to and recognize such purchaser or mortgagee as landlord under this lease, and in any such events, Landlord named herein shall not thereafter be liable on this lease.

If the holder of record of the first mortgage covering the Demised Premises shall have given prior written notice to Tenant that it is the holder of said first mortgage and that such notice includes the address at which notices to such mortgagee are to be send, then Tenant agrees to give to the holder of such first mortgage notice simultaneously with any notice given to Landlord to correct any default of Landlord as hereinabove provided, and agrees that the holder of record of such first mortgage shall have the right, within sixty (60) days after receipt of said notice to correct or remedy such default before Tenant may take any action under this lease by reason of such default.

31. Mortgagee's Approval

If any mortgagee of the Shopping Center requires any modifications of the terms and provisions of this lease as a condition to such financing as Landlord may desire, then Landlord shall have the right to cancel this lease if Tenant fails or refuses to approve and execute such modification(s) within thirty (30) days after Landlord's request therefor, provided said request is made at least thirty (30) days prior to delivery of possession. Upon such cancellation by Landlord, this lease shall be null and void and neither party shall have any liability either for damages or otherwise to the other by reason of such cancellation. In no event, however, shall Tenant be required to agree, and Landlord shall not have any right of cancellation for Tenant's refusal to agree, to any modification of the provisions of this lease relating to: the amount of rent or other charges reserved herein; the size and/or location of the Demised Premises; the duration and/or commencement date of the term; or reducing the improvements to be made by Landlord to the Demised Premises prior to delivery of possession.

32. Merchants Association

Tenant covenants and agrees to join and maintain membership during the entire term of this lease in the Merchants Association (as soon as the same has been formed) sponsored for the purpose of promoting and advertising the Shopping Center, and to abide by the regulations of such Association, which will include the provision that each member of the Association will have one (1) vote. Tenant further agrees to pay it share of the cost of the activities conducted by the Association, which costs will include but not be limited to: all promotions; seasonal decorations; wages, salaries, uniforms (if necessary), Workmen's Compensation Insurance, Social Security taxes and unemployment taxes for personnel (including a promotional director, secretaries, receptionists and information girls and security personnel) necessary for the activities or promotions of the Association; Common Area security expense; operational expenses for the mall office and meeting rooms, including utility charges and office supplies; initial furnishings and office equipment for the promotional director's office; liability insurance; and, any other charge incurred by the Association and not set forth in this clause as an expense to be borne by the Landlord. Tenant's share of said cost shall be computed at the rate of sixty-five cents (65¢) per square foot of gross area of Tenant's Demised Premises per year, provided, however, that regardless of the gross area of Tenant's Demised

Premises, Tenant's share of said cost shall not be less than a minimum charge of Five Hundred ($500) per year. Dues and assessments shall be paid by Tenant within ten (10) days after billing by either the Association or the Landlord on behalf of the Association.

Landlord will pay or contribute to the Merchants Association as its share of the cost of the activities conducted by the Association, the following: initial furnishings and equipment for the office of the mall manager and the secretary to the mall manager; complete construction of the mall offices; rent-free occupancy for the mall offices; and, an amount equal to twenty percent (20%) of the aggregate dues paid by the tenant members of the Association, which amount will be paid quarterly by Landlord based on a billing from the Association which shall include a certified statement from the Association's treasurer showing the aggregate dues paid by the tenant members of the Association during the preceding quarterly period.

The mall manager, promotional director and other personnel engaged in activities of the Association will be hired by the Landlord and will be under the control of the Landlord notwithstanding the fact that their salaries may be paid by the Association. In the event any employee of the landlord performs work for and on behalf of the Association, or in the event Landlord furnishes or provides promotional equipment to the Association (such as sign stanchions, banners, stage, public address system), the Landlord may deduct the reasonable cost and expense thereof from its quarterly contributions to the Association, provided it furnishes substantiating invoices.

33. Cost of Living Adjustment

As used herein, "Price Index" shall mean the Consumer Price Index, All Urban Consumers (U.S. City Average), as compiled and published by the Bureau of Labor Statistics, United States Department of Labor, which became effective January, 1978. If such Price Index should in the future be compiled on a different basis, appropriate adjustments will be made for the purposes of computations under this clause. If the United States Department of Labor no longer compiles and publishes such Price Index, any comparable index published by any other branch or department of the Federal Government shall be used for the purpose of computing the adjustments herein provided for, and if no such index is compiled and published by any branch or department of the Federal Government, the statistics reflecting cost of living changes

as compiled by any institution, organization or individual generally recognized as an authority by financial and insurance institutions shall be used as a basis for such adjustments.

Recognizing the length of the term of this lease and inflationary-tendencies in recent years, Tenant agrees that in the event the Price Index reflects an increase in the cost of living over and above such costs as reflected by such Price Index as it exists for the month of December immediately preceding the date of this lease (hereinafter called the "Base Index"), the annual Common Area Maintenance and the annual Merchants Association charges payable hereunder shall be adjusted as follows:

(a) There shall be an adjustment in the annual Common Area Maintenance and annual Merchants Association charges payable commencing with the first day of the term of this lease or the date the Tenant opens for business (whichever first occurs), based upon the percentage increase (if any) between the Base Index and the Price Index as it exists for the first calendar month immediately following the first day of the term of this lease (or the date the Tenant opens for business, whichever first occurs).

(i) The percentage increase thus determined shall be multiplied by the annual Common Area Maintenance charge set forth in this lease, and the total amount of such annual Common Area Maintenance charge plus the amount so determined shall constitute the annual Common Area Maintenance charge for the remainder of the first calendar year of this lease.

(ii) The percentage increase thus determined shall be multiplied by the annual Merchants Association charge set forth in this lease, and the total amount of such annual Merchants Association charge plus the amount so determined shall constitute the annual Merchants Association charge for the remainder of the first calendar year of this lease.

(b) There shall be an annual adjustment in the annual Common Area Maintenance and annual Merchants Association charges for each calendar year commencing with the first full calendar year after the commencement of the term of this lease (or after the Tenant opens for business, whichever first occurs) based upon the

percentage increase (if any) between the Base Index and the Price Index for the Month of December immediately preceding such adjustment.

(i) The percentage increase thus determined shall be multiplied by the annual Common Area Maintenance charge set forth in this lease, and the total amount of such annual Common Area Maintenance charge plus the amount so determined shall constitute the annual Common Area Maintenance charge for the calendar year next ensuing.

(ii) the percentage increase thus determined shall be multiplied by the annual Merchants Association charge set forth in this lease, and the total amount of such annual Merchants Association charge plus the amount so determined shall constitute the annual merchants Association charge for the calendar year next ensuing.

(c) The same formula shall be used in adjusting the annual Common Area Maintenance and annual Merchants Association charge for the second full calendar year of this lease and each year thereafter including option periods, if any, but no such adjustment shall result in a reduction of the annual Common Area maintenance or annual Merchants Association charges below the greater of: (1) the annual Common Area Maintenance and annual Merchants Association charges set forth in this lease; or (2) the annual Common Area maintenance and annual merchants Association charges thereafter payable as determined in accordance with subsections (a), (b) and (c) hereof.

[Clause 34 crossed out]

35. Tenant Shall Pay for All Work and Materials and Discharge All Liens

Tenant covenants and agrees that it, without cost or expense to Landlord, promptly shall pay or cause to be paid, all persons and entities for all work performed and materials supplied in improving the Demised Premises. Tenant further covenants and agrees that no such person or entity shall file a lien of any kind whatsoever or any certificate, affidavit, notice of intention or other statement relative thereto, on or against the Demised Prem-

ises, the Shopping Center, or any part thereof or interest therein. Tenant hereby undertakes to indemnify and hold harmless the Landlord against and from any and all costs and expenses incurred, including, without limitation, court costs and attorneys' fees, and any and all claims, demands, liability, loss or damage suffered by Landlord in connection with any such person's or entity's filing any such lien or asserting any right to receive any such payment, whether rightfully or wrongfully filed or asserted. Additionally, in the event a lien is filed by any such person or entity, Tenant shall bond against or otherwise cause to be discharged said lien within ten (10) days after written request by Landlord. If Tenant fails to comply with the foregoing provisions, Landlord is hereby granted the right but not the obligation to bond against or otherwise discharge any such lien and, if Landlord exercises this right, Tenant promptly shall reimburse Landlord upon demand for any and all costs and expenses incurred, including, without limitation, court costs and attorneys' fees, in connection therewith, including interest thereon at the rate of the eighteen percent (18%) per annum or the maximum interest rate permitted by law, whichever is less.

In the event the Tenant is performing any construction in the Demised Premises which is subject to a lien by any such person or entity and the law of the state in which the Demised Premises are located provides for the filing of a lien waiver or no-lien stipulation which would prevent a lien from being filed by any such person or entity, then the Tenant agrees to execute a lien waiver or no-lien stipulation (designating the Landlord as Owner and the Tenant as Contractor) and furnish it to Landlord to be filed in the proper recording office of the appropriate political subdivision.

36. Force Majeure

In the event that either party hereto shall be delayed or hindered in or prevented from the performance of any act required hereunder by reason of strikes, lockouts, labor troubles, unavailability or excessive price of fuel, power failure, riots, insurrection, war, fire or acts of God, or by reason of any cause beyond the exclusive and reasonable control of the party delayed in performing work or doing acts required under the terms of this lease, then performance of such act shall be excused for the period of the delay and the period for the performance of any such act shall be extended for a period equivalent to the period of such delay. The provisions of this clause shall not operate to excuse Tenant from

prompt payment of Minimum Rent, Percentage Rent, additional rent or any other payments required by the terms of this lease.

37. Relationship of Parties

Nothing contained in this lease shall be deemed or construed by the parties hereto or by any third party to create the relationship of principal and agent or of partnership or of joint venture or of any association whatsoever between Landlord and Tenant, it being expressly understood and agreed that neither the computation of rent nor any other provisions contained in this lease nor any act or acts of the parties hereto shall be deemed to create any relationship between Landlord and Tenant other than the relationship of landlord and tenant.

38. Tenant Defined

The word "Tenant" shall be deemed and taken to mean each and every person or entity, be the same one or more, that is mentioned as the Tenant herein or that assumes the rights and obligations of Tenant pursuant to and subject to the provisions of this lease regarding Assignment and Subletting. If at any time the word "Tenant" shall include more than one person or entity, the obligations of all such persons or entities shall be joint and several, and any notice required or permitted by the terms of this lease may be given by or to any one of them and shall have the same force and effect as if given by or to all of them. All appropriate grammatical changes shall in all instances be assumed as though in each case fully expressed where required to make the provisions of this lease apply in the plural sense where there is more than one Tenant and apply to either a corporation, a partnership, an association, or a male or female individual, or any combination of the foregoing.

39. Exoneration of Individuals

The Landlord or any successor in interest that may be an individual, joint venture, tenancy in common, firm or partnership, general or limited, shall not be subject to personal liability on such individual or on the members of such joint venture, tenancy in common, firm or partnership in respect to any of the covenants or conditions of this lease. The Tenant shall look solely to the equity of the Landlord in the property and the rents, issues and profits derived therefrom for the satisfaction of the remedies of the Tenant in the event of a breach by the Landlord. It is mutually agreed that this clause is and shall be considered an integral part of the aforesaid lease.

40. No Third Party Rights

The rights and obligations arising under this lease are personal between Landlord and Tenant and their respective successors and assigns and such rights and obligations shall not be enforceable by any third party, except for any mortgagee of Landlord. Furthermore, Tenant recognizes that it has no third party rights arising out of any agreement between Landlord and any other party other than Tenant regardless of any benefits accruing to Tenant by virtue of the terms of such agreement.

41. Broker

Tenant covenants, warrants and represents that there was no broker instrumental in consummating this lease and that no conversations or prior negotiations were had with any broker concerning the renting of the Demised Premises. Tenant agrees to hold Landlord harmless against any claims for brokerage commission arising out of any conversations or negotiations had by Tenant with any broker.

42. Notices and Payments

Any bill, statement, notice or communication which Landlord or Tenant may desire or be required to give to the other party shall be in writing and shall be sent to the other party by registered or certified mail to the address specified in the opening paragraph of this lease, or to such other address as either party shall have designated to the other by like notice, and the time of the rendition of such shall be when same is deposited in an official United States Post Office, postage prepaid.

All payments required under this lease are to be paid in legal tender and lawful money of the United States or the equivalent. All payments required under this lease to be paid to Landlord shall be delivered to the Landlord, in its name, at P. O. Box 70366T, Cleveland, Ohio 44190, or to such other address as Landlord may designate by written notice, and such payments shall be deemed to be delivered when same are actually received by Landlord.

43. No Option; Effective Date

The submission of this lease for examination does not constitute a reservation of or option for the Demised Premises and this lease becomes effective as a lease only upon mutual execution of this lease by Landlord and Tenant and delivery thereof to Tenant by Landlord. Upon mutual execution and delivery of this

lease, all of the terms, covenants and conditions of this lease shall commence and take effect, except as otherwise provided.

44. Governing Law

This lease shall be governed by and construed in accordance with the applicable laws of the state where the Demised Premises are located.

44. Governing Law

This lease shall be governed by and construed in accordance with the applicable laws of the state where the Demised Premises are located.

45. Captions and Section Numbers

The captions, section numbers and article numbers appearing in this lease are inserted only as a matter of convenience and in no way define, limit or describe the scope or intent of such sections or this lease nor in any way affect this lease.

46. Invalidity of Particular Provisions

If any term or provision of this lease, or the application thereof to any person or circumstances shall to any extent be invalid or unenforceable, the remainder of this lease or the application of such term or provision to persons or circumstances other than those as to which it is held invalid or unenforceable shall not be affected thereby, and each term and provision of this lease shall be valid and be enforced to the fullest extent permitted by law.

47. Provisions Binding

Except as herein otherwise expressly provided, the terms and provisions hereof shall be binding upon and shall inure to the benefit of the heirs, executors, administrators, successors and permitted assigns, respectively, of the Landlord and the Tenant. Each term and each provision of this lease to be performed by the Tenant shall be construed to be both a covenant and a condition. The reference contained to successors and assigns of Tenant is not intended to constitute a consent to assignment by Tenant but has reference only to those instances in which Landlord may have given written consent to a particular assignment.

48. Entire Agreement

Landlord and Tenant acknowledge and understand that there have been prior negotiations and discussions between them

regarding the terms of this lease but that all prior negotiations and discussions are superseded by this lease, including the Exhibits, Rider, if any, attached hereto, which exclusively constitutes the complete and final agreement of Landlord and Tenant and sets forth all the covenants, promises, agreements, conditions, inducements, representations and understandings between Landlord and Tenant concerning the Demised Premises or the Shopping Center. Tenant warrants and represents that there are no covenants, promises, agreements, conditions, inducements, representations or understandings, either oral or written, between them, or any agent of either of them, other than as are expressly herein set forth, and that Tenant does not and shall not have any right to rely upon any covenant, promise, agreement, condition, inducement, representation or understanding, either oral or written, which is not expressly set forth herein. Tenant acknowledges and understands that the representative(s) of Landlord who execute this lease are relying on the representations and warranties herein set forth. Except as herein otherwise expressly provided, no subsequent alteration, amendment, change or addition to this lease shall be legally biding upon Landlord or Tenant unless reduced to writing and signed by them. In the event any such subsequent alteration, amendment, change or addition to this lease is executed by a representative of Landlord other than the representative(s) executing this lease, Tenant shall have the duty to determine and confirm the authority of the person executing said subsequent writing. Tenant's failure to so determine and confirm said authority will preclude it from asserting any claim that said person had said authority (in the absence of actual authority).

IN WITNESS WHEREOF, the Landlord and Tenant have caused this lease to be signed upon the day and year first above written.

Signed in the Presence of: LANDLORD: KENTUCKY OAKS MALL COMPANY

/s/ Joanne Bajgier

By /s/_____
Anthony M. Cafaro,
Authorized Agent

/s/ Janice Ebert

By /s/_____
Ronald J. Ross, Authorized Agent

TENANT: MITCHELL'S
FORMAL WEAR, INC.

By /s/_____
Joseph B. Doyle, President

By /s/_____
TYRONE M. BRIDGES,
Asst. Secretary

STATE OF OHIO )
) SS:
COUNTY OF FULTON )

Personally appeared before me, the undersigned, a Notary Public in and for said County and State, Anthony M. Cafaro and Ronald I. Ross, known to me to be the Authorized Agents or KENTUCKY OAKS MALL COMPANY, the Partnership which executed the foregoing document, who acknowledged that they did sign the foregoing instrument for and on behalf of said Partnership, being thereunto duly authorized; that the same is their free act and deed as such Authorized Agents and the free act and deed of said Partnership.

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at Youngstown, Ohio, this 9th day of April, 19 85.

Joanne Bajgier
Notary Public

STATE OF GEORGIA )
) SS:
COUNTY OF FULTON )

Personally appeared before me, the undersigned, a Notary Public in and for said County and State, Joseph B. Doyle and Tyrone M. Bridges, known to me to be the President and Asst. Secretary, respectively, of MITCHELL'S FORMAL WEAR, INC., the Corporation which executed the foregoing instrument for and on behalf of said Corporation, being thereunto duly authorized by its Board of Directors; that the same is their free act and deed as such officers and the free act and deed of said Corporation

IN TESTIMONY WHEREOF, I have hereunto set my hand and official seal at_____, this ____ day of _____, 19____.

_____
Notary Public

# KENTUCKY OAKS MALL

MS:jlg
February 20, 1985

Unit No. 640
Mitchell's Formal Wear

## EXHIBIT A

## SHELL SPECIFICATIONS

### A. GENERAL

1. Within thirty days after Landlord's architect has provided Tenant with blockout plans for the demised premises, Tenant shall furnish to Landlord, for landlord's written approval, one set of sepia reproducible drawings (or three sets of prints) showing comprehensive design drawings and specifications, prepared by either a registered architect, a registered engineer, or an architectural designer qualified in store design or store fixture layouts. Such drawings and specifications shall include plans, elevations and details of and for storefront, room finish schedule, fixturization and mechanical and electrical systems. If Landlord refuses approval, Landlord shall advise Tenant within ten (10) days after receipt of such drawings and specifications of those revisions or corrections which Landlord requires and Tenant shall, within ten (10) days thereafter, submit revised plans, drawings and specifications to Landlord or the Landlord's architect. Immediately upon receipt of Landlord's approval, the Tenant shall: (a) submit to Landlord for Landlord's permanent records one completely revised and approved set of sepia reproducible drawings showing all of the proposed improvements within the premises, and (b) proceed to complete the premises in accordance with said approved plans, drawings and specifications, except for items set forth in Paragraph B hereof which shall constitute the "shell" to be provided by Landlord.

2. Tenant or its contractors shall obtain and pay for all required permits and fees and shall comply with all building codes, ordinances, regulations and requirements of Fire Insurance Rating Bureau, as well as Landlord's Standard Mall Construction Criteria.

3. Once the plans and specifications have been approved by the Landlord, the Tenant shall not deviate from said plans and specifications in any manner which would cause any increase in the cost of Landlord's fire and extended coverage insurance covering the demised premises, or the building in which the demised premises are located. In the event of any such deviation

by Tenant, the Tenant shall be liable for the increased premium cost to Landlord.

4. In addition to any other remedies which the Landlord may have, the Landlord shall have the right to substitute the proper materials and/or design to conform the demised premises to the plans and specifications approved by the Landlord and charge to the Tenant any and all costs and expenses incurred by the Landlord as a result thereof. In addition, Tenant shall be responsible to pay for any work which is Tenant's responsibility pursuant to this Exhibit and the Standard Mall Construction Criteria that is performed by Landlord on Tenant's behalf prior to the mutual execution of the lease. Said work would only be performed by Landlord to expeditiously complete a phase of construction and at a reasonable cost to Tenant.

5. Landlord's approval of the plans and specifications submitted by Tenant shall not release Tenant from any of its obligations relative to building codes, ordinances, requirements of the Fire Insurance Rating Bureau, Landlord's Standard Mall Construction Criteria, and Landlord/Tenant scope of work.

## B. WORK BY LANDLORD

1. Structure:

a. Frame: The building or buildings shall, at Landlord's option, be of steel frame or bea .ng wall construction.

b. Roof: Shall be a 20-year bondable built-up type. Any and all roof openings required for completion of Tenant's phase of work, including flashing, cutting of roof openings for HVAC equipment, plumbing vents, utility services, etc., shall be the complete responsibility of Tenant. The complete installation of said roof openings shall be coordinated and performed by Landlord's roofing contractor and the total cost thereof shall be paid by Tenant directly to such contractor according to the price schedule as contained in the "Standard Mall Construction Criteria".

c. Equipment Supports: Landlord shall provide extra roof joists for support of Tenant's HVAC equipment based upon Landlord's reasonable estimate of anticipated weights. Tenant shall be required to located said equipment in accordance with location of extra roof joists provided. Any and all modifications

or additions to the structural systems to support the HVAC equipment shall be the complete responsibility of the Tenant. Refer to Landlord's "Standard Mall Construction Criteria" for typical HVAC rooftop mounting details and requirements.

d. Rear and Side Walls: Walls separating demised premises from other premises and/or common building areas (other than the enclosed mall) shall, at Landlord's option, be masonry or metal studs. Landlord shall backcharge Tenant one-half (1/2) the cost of said construction. In the event Landlord elects to use metal studs for said walls, Landlord shall not be required to provide any drywall. The Tenant shall be required to install a fire-rated drywall system extended from the floor and close to the bottom of the deck. Any additional framing or supports, other than the studs furnished by the Landlord, shall be the complete responsibility of the Tenant.

Any and all other walls, including those perimeter walls fronting on any enclosed mall, and/or interior partitions, shall be furnished and installed by Tenant in accordance with Landlord's "Standard Mall Construction Criteria".

e. Rear Exit: Landlord shall not be responsible to provide exit door, if required, at Tenant's storefront area, or exit to any enclosed mall.

2. Utilities:

a. General: Landlord shall furnish telephone, water and sanitary sewer services to the perimeter of the demised premises at a point or points selected by Landlord. An electrical conduit will be installed by the Landlord from the appropriate meter point to the perimeter of Tenant's premises. The electrical and service system, other than said conduit, shall be furnished and installed by the Tenant.

b. Water Meter Clearance: In accordance with Paducah Water Works' requirements, Tenant shall at all times maintain a 3' x 3' clear unobstructed area immediately adjacent to the water meter installation together with a 3' clear aisleway accessible to the space. The Tenant shall further completely comply with the Paducah Water Works' requirements as stipulated in the "Standard Mall Construction Criteria".

c. Temporary Utilities: Tenant or its contractors

are responsible for all temporary utilities for their work, including payment of all their utility charges. For the period that Tenant utilizes Landlord's supply of temporary electric, Tenant shall reimburse Landlord at a rate of $200.00 per month; said amount shall be considered as additional rental payable along with Tenant's first month's guaranteed minimum rental.

d. Sprinkler System: Landlord has provided sprinkler mains, laterals, upright heads, etc. on a standard spacing based to accommodate Code requirements. For the existing sprinkler work performed, Tenant agrees to reimburse Landlord an amount equal to $1.25 per square foot of Tenant's total leasable area, including mezzanines, if any. The modifications and completion of the sprinkler system shall be the complete responsibility of Tenant at Tenant's sole cost and expense; such expense shall be in addition to the $1.25 per square foot mentioned above. Said completion cost shall be paid by Tenant directly to a bona fide sprinkler contractor of its choice.

Said sprinkler system installation shall comply with all governing codes, including local building inspection department, State Fire Marshall's office, and in conformance with Insurance Services Office of Kentucky and the Landlord's insurance carrier. Complete approved sprinkler shop drawings shall be submitted to Landlord's Architect for review and record in reproducible sepia prints. The Tenant's Sprinkler Contractor must comply with the following requirements:

1. It is mutually understood and agreed that the system must be completely operational during business hours of the mall. If for any reason the system has to be turned off, permission must be previously obtained from the Mall Manager and must be scheduled before or after business hours of the tenant spaces. In such case, Sprinkler Contractor shall be responsible to make sure system is again turned on prior to mall opening for business.

2. Any Sprinkler Contractor working on the existing system must in no way damage the existing system and must maintain the integrity of said system. Any damages to the existing system or liability or damages incurred by mall or tenant spaces because of the negligence of Tenant's Sprinkler Contractor, shall be paid for by Tenant.

e. It is understood that utility lines may pass

through Tenant's store area to service other areas.

f. Connection and utility availability fees or installation costs and/or fees for utility meters, sewer permits, tap-ins, utility bonds, etc., if allocable to individual storerooms, shall be paid by Tenant.

C. ALLOWANCE

Landlord will give to Tenant a total allowance of $8,000 to complete all other improvements to the demised premises. Said amount shall be paid by Landlord to Tenant upon completion of the premises by Tenant in accordance with the approved plans and specifications and upon certification by Landlord's Architect of such completion, and after opening for business by Tenant in the demised premises. As a condition precedent to collection of said allowance, Tenant shall furnish Landlord with Waivers of Liens and Contractors and Subcontractors Affidavits from all suppliers and material men and such other evidence as may reasonably be required by Landlord that all of said work and installations therein have been paid in full, including the cost of all labor, material and/or equipment. As a condition precedent to the payment of said construction allowance, Tenant shall furnish to the Landlord a copy of the "Certificate of Occupancy" for the demised premises as is issued by the appropriate State or local Bureau.

D. WORK BY TENANT

Any and all work required to finish the construction of theTenant's storeroom other than the "Shell" to be provided by Landlord, as defined above, shall be the complete responsibility of the Tenant.

# EXHIBIT B

## SIGN STANDARDS

1. The advertising or informative content of all signs shall be limited to letters designating the store name and/or type of store (which such designation of the store type shall be by general descriptive terms and shall not include any specification of the merchandise offered for sale therein or the services rendered therein) and shall contain no advertising devices, slogans, symbols or marks (other than the store name and/or type of store, as aforesaid, and other than crests and corporate shields which shall be permitted if less than 18" in width and height).

2. The letters on all signs shall be script or individual block type. No box signs will be permitted. The size of the letters shall be in proportion to the size of the sign as determined in accordance with the provisions of paragraph 5.D. of this Exhibit. Further, the letters shall be back-lighted or individually illuminated; therefore, the lamps shall be contained wholly within the depth structure of the letters.

3. The character, design, color and layout of all signs shall be subject to Landlord's architect's written approval which shall not be unreasonably withheld to the extent the sign in question complies with the criteria set forth in this Exhibit.

4. No occupant shall install more than one (1) sign on the storefront of its Demised Premises. However, an occupant of a corner store may install one (1) sign on each facade thereof, provided no more than a total of two (2) signs shall be permitted on the entire storefront of any corner store in any event.

5. All signs shall be in accordance with the following requirements:

A. The sign and any part or parts thereof shall be located within the physical limits of the storefront of the premises of the occupant and not less than 8'- 0" above the finished surface of the walkway adjacent to such premises.

B. No sign or any part or parts thereof shall be located on the room of the shopping center.

C. No sign or any part or parts thereof shall project more

than 6" beyond the storefront.

D. The maximum total area of each sign shall be determined by the following formula:

> The area of the sign (in square feet) equals foot frontage of the store multiplied by 0.6 but, in no case, more than thirty feet (30') in width.
>
> The area of the sign is defined as the area of a rectangle surrounding all of the letters of the sign. Where upper and lower case letters are used, the average height of the letters shall be used to determine the height of the rectangle. Foot frontage of the store is defined as the length of the facade upon which the sign is located and shall exclude any offsets in the storefront of the Demised Premises.

E. No sign shall exceed a maximum brightness of 100 foot lamberts.

F. All signs shall be fabricated and installed in compliance with all applicable building and electrical codes and shall bear a U. L. label.

G. The outermost dimensions or letters making up the sign shall not exceed 24" (inches) in height.

6. The fabrication, installation and operation of all signs shall be subject to the following restrictions:

A. No exposed neon, fluorescent and/or incandescent tubing or lamps, raceways, ballast boxes and/or electrical transformers, crossovers, conduit and/or sign cabinets shall be permitted.

B. No flashing, moving, flickering and/or blinking illumination, animation, emission of audible sound, moving lights and/or floodlight illumination shall be permitted.

C. The name and/or stamp of the sign contractor or sign company, or both, shall not be exposed to view.

7. The following type signs are <u>prohibited</u>:

A. Paper signs and/or stickers utilized as signs.

B. Signs of a temporary character or purpose, irrespective of the composition of the sign or material used therefor.

C. Painted or printed signs.

D. Moving signs.

E. Pylon signs.F. Interior identification signs located within ten feet of the storefront lease line, if such signs are visible from outside Demised Premises, including, but not limited to freestanding signs, signs on easels, shadow box or recessed storefront or vestibule signs, and fixture signs.

8. Sign shop drawings are required to be submitted to the Landlord for approval, in triplicate.

No. 90-726

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

MITCHELL'S FORMAL WEAR, INC.,
*Petitioner*,

v.

KENTUCKY OAKS MALL COMPANY,
*Respondent*.

**On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio**

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Did the Supreme Court of Ohio correctly assert personal jurisdiction over a nonresident corporation in an action arising from the nonresident's refusal to pay rent and other obligations due in Ohio, when the nonresident's minimum contacts with Ohio include those and other continuing obligations it agreed to perform in Ohio and did partly perform in Ohio under a shopping-mall lease creating a 10-year interdependent relationship with an Ohio resident plus other contacts substantially similar to those found to comport with due process in *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462 (1985), although a choice-of-*law* clause provides Kentucky law governs that lease of Kentucky premises?

## LIST OF PARTIES & RULE 29.1 LIST

Respondent is satisfied with Petitioner's List of Parties and Rule 29.1 List and makes this further disclosure. Respondent Kentucky Oaks Mall Company is an Ohio limited partnership. Its general partners are William M. Cafaro, an individual residing in Ohio, Anthony M. Cafaro, an individual residing in Ohio, and Eastwood Mall, Inc., an Ohio corporation. Eastwood Mall, Inc. has no parent company, and both it and its subsidiaries are closely held and are not publicly traded companies. One of Respondent's limited partners is JCP Realty, Inc., a Delaware corporation. The parent company of JCP Realty, Inc. is J.C. Penney Company, Inc., a Delaware corporation. JCP Realty, Inc. has no subsidiaries (other than those wholly owned). Respondent's other limited partner is Paducah Development Company, a Kentucky general partnership. Kentucky Oaks Corp., an Ohio corporation, is the only corporation with any direct or indirect ownership interest in Paducah Development Company. Kentucky Oaks Corp. has no parent company or subsidiaries.

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No. 90-726

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## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Respondent respectfully urges this Court to deny the writ of certiorari.

## OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported at 53 Ohio St. 3d 73, 559 N.E.2d 477 (1990). Petitioner

properly states the lower court opinions in this case are unreported. The reproduction of all three opinions in the appendix to the petition appears to be accurate except for immaterial typographical errors.

## JURISDICTION

Respondent is satisfied with the statement of jurisdiction set forth in the Petition for a Writ of Certiorari.

## CONSTITUTIONAL PROVISION, STATUTE, & RULE

The texts of the constitutional provision, U.S. Const. amend XIV, § 1, the statute, Ohio Rev. Code Ann. § 2307.382 (Anderson Supp. 1989), and the rule, Ohio Civ. R. 4.3, involved in the case are properly set out (except for immaterial typographical errors) in the Petition for a Writ of Certiorari (Pet. 3-5).

## STATEMENT OF THE CASE

This case is about the personal jurisdiction of an Ohio court predicated on the particular facts of the interdependent relationship created by a shopping-mall lease between Petitioner and Respondent. While some of what Petitioner says in the first two paragraphs of its Statement of the Case is accurate, as reiterated briefly below, Petitioner's other statements are not accurate. Conspicuously absent from Petitioner's statement are most of the details of that relationship, many of which the Ohio Supreme Court described and relied on in its unanimous opinion below.

Respondent is Kentucky Oaks Mall Company, an Ohio limited partnership affiliated with The Cafaro Company, one of the largest developers of retail shopping malls in the United States. (Pet. 6, 31a.) Petitioner is Mitchell's Formal Wear, Inc., a Georgia corporation. (*Id.*) Petitioner operates 101 stores, including stores outside Georgia, in 11 states. (Pet. 6, 3a.) It has also entered into leases with other Ohio residents besides Respondent, such as Jacobs Visconsi & Jacobs ("JVJ"), which Petitioner knows has its home office in Cleveland, Ohio. (p. 3a-4a, *infra.*)

In 1985, Petitioner knowingly negotiated a lease by mail and telephone with Respondent in Youngstown, Ohio. (Pet. 6, 3a.) Petitioner signed the Lease in Georgia and mailed it to Respondent in Ohio. (*Id.*) Respondent then signed and accepted the Lease in Ohio. (Pet. 4a.) The Lease became effective in Youngstown, Ohio. (Cl. 43; Pet. 71a.)[1] Consequently, Petitioner, as Tenant,

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[1] Although not a determinative fact, Petitioner argues, for the first time, that the Lease became effective in Georgia. (Pet. 6.) Apparently, Petitioner reads "delivery" to mean actual receipt by Petitioner. This, however, con-

entered into a Lease with Respondent, as Landlord, for a shopping center storeroom known as unit #640 in the Kentucky Oaks Mall. (Pet. 3a, 31a.) Although the shopping center is located in Kentucky, the home office of Respondent is located in Youngstown, Ohio, as identified in the first sentence of the Lease. (Pet. 4a, 31a.)

Petitioner knowingly created ongoing obligations to an Ohio resident and agreed to the exacting regulation of its business by Respondent from Ohio. (Pet. 9a.) The Lease is for ten years and requires Petitioner to remit rent, maintenance costs, merchants association fees and various other payments monthly and annually to Respondent in Ohio. (Cls. 3, 4, 5, 10, 11, 21G, 26, 32, 33; Pet. 4a, 33a-36a, 43a-46a, 55a, 62a, 65a-68a.) The Lease also requires Petitioner to obtain various approvals from and periodically submit gross sales reports and various other certificates and signed documents to Respondent in Ohio. (Cls. 2, 5, 6, 7, 8, 14, 15, 16, 21, 29, 30, 35; Pet. 32a-33a, 35a-43a, 48a-50a, 51a-55a, 63a-64a, 68a-69a.) The Lease regulates, for example, liability (Cls. 24, 27; Pet. 57a, 62a); defaults (Cl. 24; Pet. 57a); termination (Cls. 24, 31; Pet. 57a, 65a); assignment and subletting (Cl. 16; Pet. 49a); insurance (Cl. 21; Pet. 51a); auditing of gross sales (Cl. 5; Pet. 37a); percentage rent computed from gross sales (Cl. 5; Pet. 35a); business use and name (Cl. 6; Pet. 37a); hours of operation (*id.*); construction and building layout (Cl. 2 & Exhibit A; Pet. 32a, 76a.); signs and displays (Cls. 7(B)(1), (2), 8 & Exhibit B; Pet. 41a, 42a, 81a); advertis-

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tradicts the intent of the parties reflected in Clause 42 of the Lease (Pet. 71a). That clause marks the time of mailing as the time of rendition and expressly states a sole—and different—circumstance when delivery means actual receipt. Since the parties knew how to expressly require actual receipt but did not say that in Clause 43, delivery of the Lease was completed upon mailing it in Ohio.

ing and promotion (Cls. 7(A)(5), (6), 7(B)(5), 32; Pet. 39a, 42a, 65a); cleanliness (Cls. 7(A)(1), (9), 12; Pet. 39a-40a, 47a), and even vending machines (Cl. 7(B)(8); Pet. 42a). Petitioner is required to send all payments and communications to Respondent at its home office in Ohio. All payments must be actually received by Respondent. (Cl. 42.; Pet. 71a.)

In the course of dealing, Petitioner has sent rent, maintenance cost, and merchants association fee payments, certificates of sales reports, and other communication to Respondent in Ohio. (Pet. 6, 8a-9a; p. 4a-7a, *infra.*) Respondent is one of the few persons to whom Petitioner discloses its confidential sales reports, other than the I.R.S. and the state. (p. 7a, *infra.*) Indeed, Petitioner also sent a proposed lease cancellation agreement signed only by it, along with a letter and a check, to Respondent in Ohio. (Pet. 19a; p. 1a, *infra.*)

Petitioner, however, defaulted by failing to pay all the amounts the Lease requires Petitioner to pay in Ohio to Respondent. As a result, the present cause of action arose. (Pet. 3a.)

Petitioner's statement of the procedural history of the case in the common pleas court and court of appeals is accurate as far as it goes, but omits several facts. The Lease does not specify where a lawsuit may or may not be brought. (Pet. 31a.) Therefore, on January 8, 1988, Respondent sued Petitioner in Ohio. (Pet. 6, 3a.) When the common pleas court heard the dismissal motion, testimony and documentary evidence were presented, including the Lease. (p. 2a, *infra.*) Petitioner's President, Joseph B. Doyle, who had been its president for ten years and who had signed the Lease on behalf of Petitioner, testified. (p. 3a, *infra.*) Under oath, he admitted knowing that various Lease provisions regulate

Petitioner, require it to obtain approvals from Respondent in Ohio, and require Petitioner to direct payments, sales reports, and other communication to Ohio for ten years. (p. 4a-7a, *infra.*) However, the common pleas court dismissed the case because it found:

> the contract [sic] between Defendant and the State of Ohio insufficient to make it fair and reasonable for the out-of-state corporation to defend a suit in this jurisdiction.

(Pet. 17a.)

The Ohio court of appeals affirmed on June 29, 1989. (Pet. 11a.) The *sole* reason given by the court of appeals to support its judgment was that Clause 44 of the Lease (Pet. 72a)[2] provides the Lease shall be governed by and construed in accordance with the applicable laws of the State of Kentucky. (Pet. 15a-16a.)

On August 8, 1990, the unanimous Ohio Supreme Court reversed and remanded for further proceedings. (Pet. 2a.) Petitioner, however, misrepresents the decision of the Ohio Supreme Court. While Petitioner correctly describes and quotes the court's decision on the state law grounds under the Ohio long-arm statute and rule (Pet. 8), Petitioner distorts the court's decision under the Due Process Clause of the Fourteenth Amendment. The court did conclude the exercise of jurisdiction over Petitioner comports with due process, but the reason was *not* as Petitioner misrepresents:

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[2] The reproduction of the Lease in the appendix to the petition includes Clause 44, "Governing Law," *twice*, apparently due to typographical error. The actual Lease in the record contains only one Clause 44.

> merely because petitioner conducts business outside Georgia and entered into a lease with an Ohio-based limited partnership.

(Pet. 9.) Rather, the court thoroughly reviewed the record and carefully followed this Court's precedent in *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462 (1985). Its unanimous conclusion was based on Petitioner's dealings with Respondent in Ohio, creation of the continuing obligations Petitioner is to perform in Ohio, breach of those obligations causing foreseeable injury in Ohio, and failure to present a compelling case that jurisdiction would be unreasonable—in addition to the reasons given by Petitioner. (Pet. 6a-10a.)

Petitioner filed its Petition for a Writ of Certiorari on November 5, 1990, which Respondent received on November 7, 1990. To set the record straight, Respondent now explains the reasons why the case should not be reviewed by this Court.

## REASONS FOR DENYING THE WRIT

Petitioner would have this Court believe that all seven Justices of the Ohio Supreme Court somehow disregarded every personal-jurisdiction precedent of this Court and expanded personal jurisdiction by basing it simply on Petitioner's sending rent payments to Ohio. But that is not this case. The petition produces a greatly distorted reflection of the true aspect of this case. The decision below is not "confusing," as Petitioner contends. (Pet. 17.) It is Petitioner who tries to create the illusion of confusion by rewriting the opinion below and ignoring the facts. Contrary to Petitioner's meritless arguments, (1) the unanimous Ohio Supreme Court (a) did follow the *International Shoe Co.* v. *Washington*, 326 U.S. 310 (1945), test and (b) did correctly apply *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462 (1985), to the analogous facts of this case, (2) the unanimous decision below does not conflict with any comparable decisions of other jurisdictions, and (3) the unanimous decision, which is based on both Ohio and federal law, does not mean all lessees nationwide will be haled into court in every state where they fail to perform their contractual obligations. In sum, this case does not present any important questions worthy of this Court's review.

## I. THE UNANIMOUS OHIO SUPREME COURT CORRECTLY FOLLOWED THE PRECEDENTS OF THIS COURT, WHICH CONTROLLED THE OUTCOME BELOW.

The decision below and the facts of this case do not raise the specific question presented in the petition. (Pet. i.) At best, the only question presented by Petitioner is whether the quality and nature of *all* its contacts with Ohio are such that "maintenance of the suit [in Ohio] does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe*, 326 U.S. at 316 (quoting *Milliken* v. *Meyer*, 311 U.S. 457, 463 (1940)).

> Such questions generally tend to depend on the particular facts of each case, and I believe that only a marked departure by a lower court in the application of established law would persuade four Justices to grant certiorari. [T]here is no indication that it [the lower court] failed to apply the due process standards enunciated in *International Shoe*, and cases which have followed it, to the circumstances presented, and, therefore, I believe it unlikely that this issue would command the votes necessary for certiorari.

*United Methodist Church* v. *Superior Court*, 439 U.S. 1369, 1373-74 (1978) (Rehnquist, Circuit Justice), *cert. denied*, 439 U.S. 912 (1978). The Ohio Supreme Court neither markedly departed from nor failed to apply the due process standards enunciated in *International Shoe* and its progeny to the particular facts of this case. Therefore, this Court should deny certiorari in this case too.

### A. The Unanimous Ohio Supreme Court Correctly Followed All The Steps Of *International Shoe*.

By quoting passages from the opinion below out of context, Petitioner misleadingly suggests the court below did not follow all the steps of inquiry mandated by *International Shoe* and its progeny. As is clear from the actual text of its opinion, however, the unanimous Ohio Supreme Court correctly identified and analyzed all the steps of the *International Shoe* test. At the outset of Part II of the opinion,[3] the court acknowledged:

> Over forty years ago, in *International Shoe Co.* v. *Washington* (1945), 326 U.S. 310, the court announced that a state may assert personal jurisdiction over a nonresident defendant if the nonresident has "* * * certain minimum contacts with it such that maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " (Citation omitted.) *Id.* at 316.

(Pet. 7a.) Of course, the court recognized this test consists of separate steps. Identifying the first step, the court said:

> "[T]he constitutional touchstone remains whether the defendant *purposefully* established 'minimum contacts' in the forum State. *International Shoe Co.* v. *Washington*, *supra*, at 316." (Emphasis added.) *Id.* at 474. The nonresident defendant has purposefully established minimum contacts

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[3] Part I of the opinion answered the threshold question of whether Petitioner was "transacting any business" in Ohio within the meaning of Ohio's long-arm statute and rule. (Pet. 5a.) That question of state law is not raised in the petition and is not reviewable in any event.

> "* * * where the contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum State * * * where the defendant 'deliberately' has engaged in significant activities within a State * * * *or* has created '*continuing obligations*' between himself and residents of the forum * * * he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by 'the benefits and protections' of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in the forum as well." (Citations omitted and emphasis added in part.) *Id.* at 475-476. Furthermore, minimum contacts are satisfied when the defendant foreseeably causes injury in the forum state if " '* * * the defendant's conduct and connection with the forum .State are such that he should reasonably anticipate being haled into court there.' * * *" *Id.* at 474 (quoting *World-Wide Volkswagen Corp.* v. *Woodson* [1980], 444 U.S. 286, 297).

(Pet. 7a-8a) (quoting *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 474-76 (1985)). The court next identified the second step:

> [T]he question of whether personal jurisdiction exists does not end with a finding that the nonresident defendant has purposely established minimum contacts . . .:
>
> "Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction

> would comport with '*fair play and substantial justice.*' "

(Pet. 8a) (quoting *Burger King*, 471 U.S. at 476-77).

Contrary to Petitioner's contention (Pet. 10, 11, 13), the Ohio Supreme Court did not ignore the "minimum contacts" step. Rather, the court specifically did analyze Petitioner's "minimum contacts" with Ohio *first*, and then turned to the "fair play and substantial justice" step.

> In light of the guidelines articulated above, and after a thorough review of the record before us, it is apparent that Mitchell's [Petitioner] *purposefully directed* activities at an Ohio-based limited partnership, so that it could *reasonably anticipate being haled into* an Ohio court. Moreover, it is equally evident that the assertion of personal jurisdiction over Mitchell's comports with *fair play and substantial justice.*
>
> . . . .
>
> Whether a nonresident defendant purposefully established minimum contacts with the forum depends upon the dealings between the parties prior to and following the document's execution, contemplated future consequences, *along with the terms* of the contract. . . . [C]onsidering Mitchell's dealings and the creation of continuing duties and obligations with appellant [Respondent], we are satisfied that the guidelines set forth in *Burger King* have been met.
>
> Having found that Mitchell's purposefully established minimum contacts with Ohio, it now remains only to inquire whether the assertion of jurisdiction comports with "fair play and substantial justice."

(Pet. 8a-9a) (citation omitted). Only then did the court consider the "other factors" of Respondent's interest in litigating in Ohio, the State's interest in providing its citizens a forum, and the lack of burden on Petitioner. (Pet. 9a-10a.)

Consequently, when Petitioner claims that the court erred by giving the "other factors" paramount importance over Petitioner's purposefully establishing contacts with Ohio (Pet. 13), Petitioner contradicts the explicit reasoning of the Ohio Supreme Court. Likewise, this case does not conflict with *Hanson* v. *Denckla*, 357 U.S. 235 (1958), *Shaffer* v. *Heitner*, 433 U.S. 186 (1977), *Kulko* v. *Superior Court*, 436 U.S. 84 (1978), or *Rush* v. *Savchuk*, 444 U.S. 320 (1980). Trying to create an appearance of conflict, Petitioner quotes out of context the court's consideration of the "other factors." (Pet. 11.) But the differences between the material facts of this case and each of those decisions could not be more complete. Moreover, Petitioner's misreading of the opinion below doubtless is the result of its misreading of *Burger King*. Attempting to support its theory that a court cannot consider these "other factors" to have such great importance as to save jurisdiction when minimum contacts are few, Petitioner quotes from *Burger King* concerning the consideration of these "other factors" but abruptly stops short. (Pet. 13.) The very next sentence after the quoted passage makes clear that the consideration of "other factors" is not wholly divorced from the minimum-contacts analysis and may even save jurisdiction:

> These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would other-

> wise be required. See, *e.g.*, *Keeton* v. *Hustler Magazine, Inc.*, *supra*, at 780; *Calder* v. *Jones*, *supra*, at 788-789; *McGee* v. *International Life Insurance Co.*, *supra*, at 223-224.

*Burger King*, 471 U.S. at 477. Unlike Petitioner, the Ohio Supreme Court accurately quoted both passages and correctly recognized the reinforcing effect of these "other factors." (Pet. 8a.)

Therefore, the Ohio Supreme Court did not depart from the established due process standards. The correctness of the court's weighing of the particular facts is discussed next.

### B. The Unanimous Ohio Supreme Court Correctly Applied The Due Process Standards of *Burger King* To The Analogous Facts In The Record Of This Case.

The unanimous opinion below does not conflict with *Burger King* because the Ohio Supreme Court correctly applied the principles enunciated in *Burger King* to the substantially similar facts of this case. This Court resolved the uncertainty of determining minimum contacts based on a contract by identifying the factors that must be evaluated in contract cases:

> prior negotiations and contemplated future consequences, along with the terms of the contract and the parties' actual course of dealing.

471 U.S. at 478-79. These factors remain especially workable guides and were expressly evaluated below by the Ohio Supreme Court:

> Although the lease contains a choice-of-law

> provision, this, standing alone, does not automatically defeat a finding that minimum contacts exist. *Burger King*, *supra*, at 478. Whether a nonresident defendant purposefully established minimum contacts with the forum depends upon the dealings between the parties prior to and following the document's execution, contemplated future consequences, *along with the terms* of the contract. *Id.* at 479. We are aware that the choice-of-law provision may be a significant factor in the overall picture; however, considering Mitchell's dealings and the creation of continuing duties and obligations with appellant, we are satisfied that the guidelines set forth in *Burger King* have been met.

(Pet. 9a.)

The court reached this result because the record contains facts substantially similar to the facts in *Burger King*. (Pet. 7a.) Some of those facts are described in the opinion below:

> Mitchell's conducted negotiations of the lease terms by telephone contact to Ohio with appellant, an Ohio-based limited partnership. Mitchell's intentionally and *purposefully* directed activities at Ohio when it agreed to the contract terms, signed the document in Georgia and sent it to Ohio to be signed by appellant. The ten-year lease requires that Mitchell's submit to appellant on a monthly or annual basis rental payments, maintenance costs, association fees and sales reports. If Mitchell's refuses to make the contractually required payments in Ohio, as alleged by appellant, such refusal will undoubtedly cause foreseeable injuries. Further, Mitchell's is not provided with unfettered control of its retail sale

> and rental operation. The lease calls for appellant's approval in many areas and also restricts or regulates many activities. Mitchell's is also aware that all communications need to be directed to appellant in Ohio.

(Pet. 8a-9a.)

In comparison, this Court earlier upheld the assertion of personal jurisdiction over a Michigan resident by a court in Florida based on similar facts:

> Rudzewicz did not maintain offices in Florida and, for all that appears from the record, has never even visited there. Yet this franchise dispute grew directly out of "a contract which had a *substantial* connection with that State." *McGee* v. *International Life Insurance Co.*, 355 U.S., at 223 (emphasis added). Eschewing the option of operating an independent local enterprise, Rudzewicz deliberately "reach[ed] out beyond" Michigan and negotiated with a Florida corporation for the purchase of a long-term franchise and the manifold benefits that would derive from affiliation with a nationwide organization. Upon approval, he entered into a carefully structured 20-year relationship that envisioned continuing and wide-ranging contacts with Burger King in Florida. In light of Rudzewicz's voluntary acceptance of the long-term and exacting regulation of his business from Burger King's Miami headquarters, the "quality and nature" of his relationship to the company in Florida can in no sense be viewed as "random," "fortuitous," or "attenuated." Rudzewicz's refusal to make the contractually required payments in Miami . . . caused foreseeable injuries to the corporation in Florida. For these reasons, it was, at the very least,

> presumptively reasonable for Rudzewicz to be called to account there for such injuries.

471 U.S. at 479-80 (citations omitted).

Based on Petitioner's prior negotiations and subsequent dealings with Respondent in Ohio, creation of continuing obligations to be performed in Ohio, and acceptance of extensive regulation from Ohio, this case strongly resembles *Burger King*. The Ohio Supreme Court weighed the facts correctly in favor of jurisdiction.

In both cases, the contracts include comprehensive leases. *Cf.* 471 U.S. at 464. Petitioner's attempt to distinguish the Lease from a franchise and limit *Burger King* to franchise cases ignores the reality of the relationship and puts form before substance. Although this case does not involve a typical franchise, the shopping-mall lease creates a similar long-term, interdependent relationship. "Eschewing the option of operating an independent local enterprise," Petitioner chose to be identified with the name and success of Respondent's shopping mall. By doing so, Petitioner sought to derive benefits not only from Respondent but also from the expertise of one of the nation's largest shopping mall developers affiliated with Respondent.

Ignoring *Burger King*, Petitioner makes too much of the location of the leased property and Petitioner's physical absence from the forum. In both cases, the leased property is outside the forum, the nonresident was not physically present in the forum, and the nonresident communicated by mail and telephone with the forum. *Cf. id.* at 466, 476, 479, 481.

Moreover, in both cases, the lease requires the

nonresident to perform continuing obligations in the forum, such as making periodic payments there, including percentage rent computed from gross sales. Both contracts exactingly regulate from the forum many of the same things, such as liability, defaults, termination, assignments, insurance, auditing, business use and name, hours of operation, building layout, displays, advertising and promotion, cleanliness, and even vending machines. *Cf.* p. 4-5, *supra*, *with* 471 U.S. at 464-65, n. 4.

Petitioner attempts to summarily dismiss these extensive regulations by casually calling them "incidental to the purpose of the contract—to establish a Mitchell's Formal Wear store in Paducah, Kentucky." (Pet. 12.) By that logic, the purpose of Rudzewicz's contract with Burger King was to establish a hamburger restaurant in Michigan and the regulations there were likewise "incidental"! Rather, in both cases, the regulations are part of the same deal and part of the *quid pro quo* for establishing the business location. The purpose of the regulations is the same in both cases: to assure uniformity, quality, and patron satisfaction. Just as each franchisee affects Burger King, the success and reputation of each tenant affects the success and reputation of Respondent. Thus, Respondent regulates virtually every aspect of the shopping-mall landlord-and-tenant relationship, including material aspects of the tenant's business. Petitioner's view of the object of the lease is short-sighted. As in *Burger King*, the object is not only the leased property but also the interdependent relationship that requires Petitioner to perform continuing obligations and accept regulation in Ohio.

Likewise, Petitioner's characterization of Respondent's residence as a "mere fortuitous consequence" (Pet.

12) must fail. From the beginning of the negotiations through the present, Respondent's residence has remained constant—as identified in the Lease itself. Respondent's home office in Youngstown, Ohio, with which Petitioner dealt throughout, is as "fortuitous" as Burger King's headquarters in Miami, Florida! In both cases, the contract requires the nonresident to send all notices and payments to the home office in the forum. As in *Burger King*, Petitioner knew it was dealing with a company based in the forum, where all major business decisions were made as evinced by Petitioner's sending not only the Lease, periodic payments, and sales reports, but also the lease cancellation agreement to Ohio for acceptance by Respondent. *Cf.* 471 U.S. at 480.

Petitioner's characterization of its failure to make payments in Ohio as "its alleged failure to perform its part of the contract in Georgia" (Pet. 12) ignores the express language of the Lease, *Burger King*, and long-settled law. Clause 42 expressly requires Petitioner's payments to be actually received in Ohio by the Respondent. (Pet. 71a.) *Burger King* concluded the failure to make contractually required payments from Michigan to Florida caused injury in Florida. 471 U.S. at 480. A breach occurs and the cause of action arises where payment is due. *E.g.*, *Wester* v. *Casein Co. of America*, 206 N.Y. 506, 100 N.E. 488, 490 (1912). As did this Court in *Burger King*, the Ohio Supreme Court also found that the action in this case arises from the injury to Respondent in Ohio caused by Petitioner's refusal to make the payments. (Pet. 9a.)

Therefore, Ohio's assertion of personal jurisdiction over Petitioner is presumptively reasonable. The reasonableness is also reinforced by the "other factors" identified in *Burger King*. Respondent and Ohio have

strong interests in adjudicating the dispute in Ohio, since the Ohio legislature intended to provide a forum there and Ohio has an interest in resolving suits brought by its citizens and seeing that they get the benefit of their bargains. Requiring Petitioner to defend in Ohio is not a burden in this age of modern transportation. (Pet. 9a-10a.) After all, Petitioner operates 101 stores in 11 states. It was only in this context that the court below observed that Petitioner, having ventured extensively beyond Georgia to Kentucky, can just as easily travel to the neighboring state of Ohio to defend against this action. (Pet. 9a.) The burden on Petitioner is not excessive. (Pet. 9a.) Petitioner simply failed to carry its burden of showing a compelling case of unreasonableness or unfairness. (Pet. 8a.)

Petitioner's argument reduces to the novel theory that a choice-of-law clause selecting nonforum law to govern the Lease destroys otherwise proper personal jurisdiction in the forum. This theory has never been the rule, except for the short-lived Ohio court of appeals opinion below. (Pet. 15a-16a.) Indeed, the unanimous rejection of this theory by the Ohio Supreme Court (Pet. 9a) is consistent with every other jurisdiction that has considered it.[4]

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[4] *Haisten* v. *Grass Valley Medical Reimbursement Fund, Ltd.*, 784 F.2d 1392, 1399-1400 (9th Cir. 1986) (contractual choice of Cayman Islands law "alone will not suffice to block jurisdiction" in California); *Jackam* v. *Hospital Corp. of America Mideast*, 800 F.2d 1577, 1581-82 (11th Cir. 1986) (a plaintiff may prove minimum contacts with Georgia despite contractual choice of Saudi Arabia law); *Southern Machine Co.* v. *Mohasco Indus.*, 401 F.2d 374, 382 (6th Cir. 1968) (contractual choice of New York law "cannot change the business realities of the transaction" when other facts evinced the minimum contacts necessary for jurisdiction in Tennessee); *Marine Charter & Storage Ltd.* v. *Denison Marine, Inc.*, 701 F. Supp. 930, 934-36 (D. Mass. 1988) (contractual choice of Florida law is not determinative of whether nonresident "purposefully availed itself of the benefits

Even when courts find jurisdiction does not exist, they consider the choice-of-law provision only parenthetically, attaching far greater importance to the lack of continuous obligations to or lack of regulation from the forum. *LAK, Inc.* v. *Deer Creek Enter.*, 885 F.2d 1293, 1295 (6th Cir. 1989), *cert. denied*, 110 S.Ct. 1525 (1990).

This theory should be rejected for good reason. First, such a rule would make a choice-of-law clause tantamount to a choice-of-forum clause. Second, such a rule would lead to the absurd result that personal jurisdiction in a contract case would exist if nonforum law governed because the contract was silent, but would not exist if the contract happened to include a choice-of-law clause providing nonforum law governed. *See Burger King*, 471 U.S. at 477, 483 n. 26 (jurisdiction not unconstitutional when choice-of-law rules can be applied). Third, such a rule would have a chilling effect on the voluntary inclusion of choice-of-law clauses in contracts and would increase the number of conflicts of law for the courts to untangle. Therefore, Petitioner's theory would be bad public policy.

Contrary to what Petitioner says, the court below did not ignore the dicta in *Burger King* about the effect of a choice-of-law provision and did not fail to give any weight to the Kentucky law provision. Rather, like this

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and protections of Massachusetts law"); *Wright Int'l Express* v. *Roger Dean Chevrolet*, 689 F. Supp. 788, 791 (S.D. Ohio 1988) (lease provided minimum contacts with Ohio, despite contractual choice of Florida law); *Beco Corp.* v. *Roberts & Sons Constr. Co.*, 114 Idaho 704, 760 P.2d 1120 (1988) (personal jurisdiction in Idaho despite contractual choice of Arizona law; even the lone dissenter considered the choice-of-law provision not dispositive, but only one factor).

Court, the court understood that such a provision standing alone is not sufficient but must be viewed in the greater context of *all* the jurisdictional facts. (Pet. 9a.) *Cf.* 471 U.S. at 482. The fact Petitioner relies on does not outweigh the facts supporting jurisdiction. An otherwise proper forum, such as Ohio, does not become unforeseeable simply because the law of another state applies.

*Burger King*, being by far the most analogous precedent, controls. Therefore, the Ohio Supreme Court correctly applied the due process standards to the facts of this case.

## II. THE UNANIMOUS DECISION OF THE OHIO SUPREME COURT DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER JURISDICTION.

The unanimous decision of the Ohio Supreme Court does not conflict with the decisions of other jurisdictions. Supreme Court Rule 10.1 states in pertinent part:

> A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> . . . .
>
> (b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

Although Petitioner claims such a conflict, only one of the six cases Petitioner cites is a decision of a federal court of appeals. (Pet. 16-17.) But even that one case was decided 10 years *before* this Court's decision in *Burger King*. None of the remaining five is the decision of another state's court of last resort. While three of Petitioner's cited cases were decided after *Burger King*, only one involved federal due process. All six cases are readily distinguishable from this case so that no conflict exists.

Petitioner's reliance on *Grossman* v. *Wal-Mart Stores*, 682 F. Supp. 752 (S.D. N.Y. 1988) (suit by lessor against lessee's assignee), *Advance Realty Assocs.* v. *Krupp*, 636 F. Supp. 316 (S.D. N.Y. 1986) (suit by real estate broker against purchaser), and *DelBello* v. *Japanese Steak House*, 43 A.D.2d 455, 352 N.Y.S.2d 537 (App. Div.

1974) (suit by franchisee against franchisor) is grossly misplaced. None of these cases even mentions due process or *International Shoe* or any of its progeny. All three were decided solely on the state law grounds of what constitutes "doing business" or "transaction of business" under New York law.

Nor does the decision below conflict with *Northern Trust Co.* v. *Randolph C. Dillon, Inc.*, 558 F.Supp. 1118 (N.D.Ill. 1983). Petitioner's recitation misstates and omits several important facts. First, Petitioner mistakenly says, with emphasis, that "the defendant engaged in telephone calls with the Illinois plaintiff." This is not one of the facts from *Northern Trust*, but is a fact from one of the precedents discussed by that case. Even so, *Burger King*, decided two years later, now teaches that such telephone calls are significant contacts. Second, Petitioner omits telling that the nonresidents' *only* contacts with Illinois were the sending of lease payments there. *All* negotiations occurred in California. The nonresidents' agent had not even dealt with the Illinois office. *Id.* at 1123. In contrast, Petitioner's contacts with Ohio in this case far outnumber and outweigh merely sending payments.

Similarly, *Arthur, Ross & Peters* v. *Housing, Inc.*, 508 F.2d 562 (5th Cir. 1975), does not conflict with the decision of the Ohio Supreme Court. *Arthur, Ross* did not involve a lease and is factually and legally distinguishable. Although the federal court also discussed federal due process, its analysis of Texas law on substituted service of process provided an adequate independent state law grounds for denying jurisdiction. Texas legislation indicated only performance of a contract, and not its negotiation or execution, can be considered when determining personal jurisdiction over a

nonresident. In its summary of *Arthur*, *Ross*, Petitioner misleadingly refers to partial performance in Texas, trying to force a comparison to this case. There, however, the plaintiff unilaterally mailed its own initial payment *from* the forum. This was not sufficient "performance." But the court observed it might be a different matter if the contract expressly required payment to be made in the forum. The nonresident's only contacts were certain notices and reimbursements the contract required to be mailed to Texas, which the court held were not dispositive based on *Hanson* v. *Denckla*, 357 U.S. 235 (1958). The court also thought physical presence was necessary. 508 F.2d at 564-65. Because the facts are different in this case, including the express requirement that payments be made in the forum, and because the federal court did not have the benefit of this Court's teachings in *Burger King*, which was decided 10 years later, there is no conflict.

Finally, *Signet Bank/Virginia* v. *Tillis*, 196 Ga. App. 433, 396 S.E.2d 54 (1990), the only case Petitioner cites that discusses *Burger King*, does not conflict with the decision below because the facts are plainly distinguishable. *Signet Bank* involved a consumer credit card, not a commercial lease. There were no prior negotiations. The plaintiff made the offer and the nonresident accepted it outside the forum. The nonresident was a passive party, who was not required to do anything except send payments *if* he used the credit card. Each use of the credit card was a new, one-shot contract. The facts could hardly differ more from this case.

Therefore, Petitioner has failed to identify any conflict between the unanimous decision of the Ohio Supreme Court and the decision of any other jurisdiction.

## III. THE UNANIMOUS DECISION OF THE OHIO SUPREME COURT IS SOUND POLICY AND PETITIONER'S SPECULATION THAT OTHER STATES MIGHT CHOOSE TO *EXPAND* IT TO HALE LESSEES INTO COURT UNDER CIRCUMSTANCES DIFFERENT FROM THIS CASE IS IRRELEVANT.

Petitioner's hypotheticals bear no resemblance to the particular facts of the decision in this case and are far outside the realm of the decision. The Ohio Supreme Court did not create a *per se* rule that all commercial lessees are amenable to personal jurisdiction under all circumstances. Nor is its decision a binding precedent outside Ohio. Indeed, Petitioner concedes that its "post office box" hypothetical is "extreme." (Pet. 18.) Even the "Alaska-California-Florida" hypothetical is "extreme." Nothing in the opinion below says jurisdiction would be proper on such scant facts. Typical of its approach to this case, Petitioner omits all detail of the nature and quality of the nonresident's contacts. Knocking down straw-men, Petitioner asks this Court to grant certiorari to review hypothetical cases that may or may not ever actually arise. By no means is it certain that other states will expand this Ohio decision to such different circumstances. Moreover, Petitioner forgets that personal jurisdiction usually involves a question of state law as well as federal due process. Other states are free to adopt and interpret their own long-arm statutes and rules more narrowly. Thus, if a nonresident commercial lessee is beyond the reach of the long-arm statute as a matter of state law, those states will never reach the federal due process issue reached in this case. There will be ample opportunity to review Petitioner's imagined worst scenarios if and when they become "actual cases and

controversies." Meanwhile, *Burger King* and the other precedents of this Court continue to provide adequate guidance.

Petitioner's argument also proceeds from the false premise that a nonresident should not be haled into court in the forum where the nonresident knowingly causes injury. Such a "policy" is contrary to the unbroken line of precedents of this Court.

> An individual injured in California need not go to Florida to seek redress from persons who, though remaining in Florida, knowingly cause the injury in California.

*Calder* v. *Jones*, 465 U.S. 783, 790 (1984) (citing *McGee* v. *International Life Ins. Co.*, 355 U.S. 220 (1957) earlier in the opinion). *Accord Burger King*, 471 U.S. 462, 480 (1985). There is no reason to believe that commercial lessees as a class require special protection under a different due process standard.

Finally, Petitioner seeks nothing less than the judicial rewriting of contracts and leases. The decision of the Ohio Supreme Court does not preclude Petitioner or any other commercial lessee from bargaining with its lessor for a choice-of-*forum* clause or for other terms affecting the structure of their relationship, their contemplated future consequences, and their actual course of dealing. Like all other aspects of a commercial contract or lease, personal jurisdiction is a negotiable, economic term. Yet, Petitioner would constitutionalize a special federal advantage for all commercial lessees to the disadvantage of all commercial lessors. The present due process standards, however, adequately protect commercial lessees and lessors alike.

## CONCLUSION

For all these reasons, Respondent respectfully urges this Court to deny the writ of certiorari.

Respectfully submitted,

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*Counsel for Respondent*

# APPENDIX

**[This is the Exhibit B Petitioner omitted from the appendix to the petition, Pet. 21a.]**

December 28, 1987

Mr. Matt Smith
The Cafaro Company
2445 Belmont Avenue
P.O. Box 2186
Youngstown, Ohio 44504-0186

Re: Lease Agreement dated March 28, 1985
Landlord: Kentucky Oaks Mall Company
Tenant: Mitchell's Formal Wear, Inc.

Dear Mr. Smith:

Please find enclosed Mitchell's check in the amount of $7,000.00 pursuant to the oral agreement reached regarding cancellation of the subject Lease Agreement to be effective January 8, 1988.

Very truly yours,

Joseph B. Doyle

JBD/
Enclosures

EXHIBIT B

**PLAINTIFF'S**
**TRANSCRIPT OF PROCEEDINGS**
**AND EXHIBIT ON APPEAL**

STATE OF OHIO )
) SS.
COUNTY OF MAHONING)

IN THE COURT OF COMMON PLEAS

Case No. 88 CV 57

---

KENTUCKY OAKS MALL COMPANY,
Plaintiff

vs.

MITCHELL'S FORMAL WEAR, INC.
Defendant

---

APPEARANCES: Attorney JAY BLACKSTONE
On Behalf of Plaintiff

Attorney DANIEL P. DANILUK
On Behalf of Plaintiff

Attorney JEFFREY B. FLECK
On Behalf of Defendant

Attorney ARCHER D. SMITH, III
On Behalf of Defendant

BE IT REMEMBERED that at the trial of the above entitled cause, in the Court of Common Pleas, Mahoning County, Ohio, on the 8th day of June, 1988, before the Honorable WILLIAM G. HOUSER, the above appearances having been made, the following proceedings were had:

* * * *

[7] WHEREUPON, The Defendant called

**JOSEPH B. DOYLE,**

who, being first duly sworn,
testified as follows:

[8] THE COURT: Give that gentleman your full name and address, please.

MR. DOYLE: Joseph B. Doyle, 51 Inland Circle, Atlanta.

THE COURT: Atlanta, Georgia?

MR. DOYLE: Georgia.

* * * *

[14] CROSS EXAMINATION:

By Mr. Blackstone

Q Mr. Doyle, how long have you been President of Mitchell's?

A Ten years.

Q Ten years?

A Yes.

* * * *

Q And are you familiar with a Shopping Mall Development Corporation which goes by the name of JVJ?

A Yes.

Q Which is also possibly known as Jacobs, Visconsi [15] & Jacobs?

A I am, yes.

Q Are you?

A Yes, sir.

Q Are you located or is Mitchell's Formal Wear located in any JVJ Malls?

A Yes, we are.

Q Could you tell us which ones?

A We have several in the Carolinas.

Q Do you know where the JVJ home office is?

A Cleveland.

Q Cleveland, Ohio?

A Yes.

Q And do you have a copy of the lease in front of you for Kentucky Oaks —

A Yes.

Q And that's the one —

A I'm sure.

* * * *

[17] Q And could you also turn to paragraph 5 of the lease, or article 5?

A Yes.

Q And that paragraph is labeled "Percentage Rent". Could you read that and explain to the Court the mechanics of that paragraph?

A Well, the way "Percentage Rent" works is, if a tenant's sales are favorable, then a certain percentage of the sales above a specified level are tendered to the landlord as an additional rental payment, and in this case it is six percent of the specified amount of $200,000.00 for the first five years, and $225,000.00 for the second five years.

Q How does the landlord know whether you, whether Mitchell's Formal Wear has reached a particular level of gross sales?

A By periodic sales records that we submit to the landlord.

Q And in what form are those sales reports submitted?

A Well, they come from monthly and annual reports that are signed by an officer of the company.

[18] Q And which officer is that?

A Our Vice-President of Finance.

Q Could you turn to Article 6 of the lease?

A Yes, sir.

Q And without going into too much detail could you briefly summarize to the Court the mechanics of that paragraph; and in particular I'm really referring to the very first paragraph.

A Well, the very first paragraph states that we shall have the right to sell and rent formal wear on the demised premises.

Q And you couldn't sell hamburgers from that premises; is that correct?

A That's correct, not without approval.

Q Could you turn to Article 8 of the lease?

A Yes, sir.

Q And could you read the caption of that article?

A "Signs."

Q And in the interest of brevity and so that we are able to move along quickly, that paragraph means, for example, that you couldn't put up a sign with flashing lights, or you couldn't have an audio loudspeaker shouting into the mall that Mitchell's Formal Wear is doing business at this [19] particular unit; is that correct?

A Yes.

Q Basically the sign that you put up must be approved by the landlord?

A That's correct.

Q Okay.

A Basically any signs that we put up.

Q Could you turn to Article 11 of the lease?

A Yes, sir.

Q Which is labeled "Common Area Maintenance",

and also briefly could you state the mechanics of how that particular article works?

A Well, there are costs incurred in running a shopping center such as maintaining the parking lots, paying maintenance people, security people and so forth, and the tenants pay a pro rata share of these charges, costs, which are called "Common Area Maintenance."

Q Paid to whom?

A To the landlord.

* * * *

[20] Q Okay. We'll pass over that for now.

Could you also turn to Article 32 of the lease and tell this Court and me, if you can, and if you can't —

A Right.

Q Can you?

A Yes.

Q And also could you define the mechanics of that particular article?

A Yes. To promote the mall there is often times what is called a "Merchants Association" where the, the tenants of the shopping center contribute a specified amount of money on a periodic basis to the association which has the responsibility of furthering the success of the shopping center through promotions for the benefit of the tenants and so forth.

Q And Mitchell's Formal Wear, for example, would [21] pay a fee to the landlord; is that basically —

A A pre-determined fee, yes, that's correct.

Q To the landlord?

A That's correct, to the landlord.

* * * *

[22] Q Mr. Doyle, you're the President of Mitchell's Formal Wear?

A President.

Q And can you tell us how many entities or persons other than employees or shareholders of Mitchell's Formal Wear have access to the sales figures, gross sales figures of a particular store of Mitchell's Formal Wear?

A Gosh, that's pretty hard to say. We have all of the key personnel in the various stores throughout those states I mentioned. Like for Kentucky Oaks you have Kentucky as well as, ah, Georgia which has a portion involved. Then you would have Kentucky Oaks Company, the mall management. The people on sight certainly have that information. And, ah, I cannot speak for the number of people within Kentucky Oaks [23] Company that we have access, would have access to that. But that would be it. Internal Revenue Service, state.

* * * *

[40] **REPORTER'S CERTIFICATE**

I HEREBY CERTIFY that the foregoing is a true and correct transcript of all evidence introduced and proceedings had in the trial of the within named case as shown by my stenographic notes taken by me during the trial and at the time the evidence was being introduced.

/s/ RAYMOND D. TOMKO
Official Shorthand Reporter

No. 90-726

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1990

MITCHELL'S FORMAL WEAR, INC.,
*Petitioner,*

v.

KENTUCKY OAKS MALL COMPANY,
*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

## BRIEF OF NATIONAL RETAIL FEDERATION, AS *AMICUS CURIAE,* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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December 7, 1990

CASILLAS PRESS INC. – 1717 K Street NW, Washington DC 20036 – 223-1220

## QUESTION PRESENTED

Did the Supreme Court of Ohio violate the Petitioner's fourteenth amendment right to due process of law by holding that Petitioner was subject to personal jurisdiction of the Ohio courts under the Ohio long-arm statute when Petitioner entered into a single contract with the Respondent, an Ohio resident, for the lease of certain property in Kentucky in which the Petitioner operates a retail business and when that single contract was negotiated over the phone and the Petitioner never set foot in Ohio?

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## BRIEF OF NATIONAL RETAIL FEDERATION, AS *AMICUS CURIAE,* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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This brief is respectfully submitted on behalf of the National Retail Federation (NRF), as *amicus curiae*. Pursuant to Rule 37.2 of the rules of this Court, NRF has obtained and filed the written consent of each of the parties to the filing of this brief. NRF supports the position of the Petitioner in this case, requests that the petition be granted and urges that the decision below be reversed.

## CONSTITUTIONAL PROVISION INVOLVED

**U.S. Const. Amend. XIV.**

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

Petitioner is a Georgia corporation which operates retail stores throughout the southeastern United States. Petitioner does not operate any stores outside of the southeast region of the United States. Petitioner has never operated a retail store in the state of Ohio.

Respondent is an Ohio limited partnership which owns and operates a mall in the state of Kentucky. The respondent is controlled by the Cafaro Company, which is based in Ohio and which is one of the largest developers of shopping malls in the United States.

In 1985 the petitioner entered into an agreement with the respondent whereby the petitioner would lease a shop in the Kentucky Oaks Mall from the respondent for the purpose of operating one of petitioner's retail stores. The Kentucky Oaks mall is located in Paducah, Kentucky. Petitioner has no agents, employees, offices or stores in Ohio. In negotiating the lease agreement, the petitioner never went to Ohio. The lease provides that Kentucky law governs any conflicts which arise between the petitioner and respondent. The petitioner's only contacts with Ohio were telephone conversations with the respondent, sending a signed copy of the lease agreement from Georgia to the respondent in Ohio, and mailing rent checks to the respondent in Ohio.

In January of 1988, the respondent sued the petitioner in the Court of Common Pleas of Mahoning County, Ohio, alleging that the petitioner had breached the lease agreement. Petitioner moved to dismiss the complaint on the grounds that the Ohio courts did not have personal jurisdiction over the petitioner. On September 20, 1988, the Court of Common Pleas granted the petitioner's motion and dismissed the respondent's complaint.

On September 26, 1988, the petitioner filed suit against the respondent in Kentucky, where Kentucky Oaks Mall is located. That case involves the same issues as those set out by the respondent in the present case. The Kentucky case is pending.

Respondent appealed the Ohio trial court's dismissal to the Ohio Court of Appeals for the Seventh District, Mahoning County, Ohio. The Court of Appeals affirmed the dismissal.

On July 28, 1989, respondent appealed to the Supreme Court of Ohio. On August 8, 1990, the Supreme Court of Ohio reversed the decision of the Court of Appeals and remanded the case for further proceedings. The Supreme Court of Ohio held (1) that the petitioner was transacting business in Ohio by virtue of having entered into the lease agreement with a resident of Ohio and by sending rent checks to the respondent in Ohio, and (2) that the petitioner was, therefore, subject to personal jurisdiction under the Ohio long-arm statute and that its due process rights would not be violated by being forced to defend itself in the courts of Ohio.

The petitioner filed a Petition for a Writ of Certiorari in this Court on November 5, 1990.

## INTEREST OF *AMICUS CURIAE*

National Retail Federation (NRF) is the largest national trade association representing the retail industry. Created by a recent merger between the American Retail Federation and the National Retail Merchants Association, the new organization represents fifty state retail associations and twenty seven national retail associa-

tions. In total, NRF represents over one million retail establishments in the United States, which employ nearly sixteen million people.

As a representative of such a large number of retail establishments, NRF is naturally interested in any litigation involving a retail business. NRF is particularly interested in the present case because of the broad effect the decision of the Ohio Supreme Court will have on retailers if allowed to stand. The vast majority of retail businesses in the United States lease the buildings in which they operate their stores. Therefore, NRF members are involved in thousands of lease agreements every year similar to the one in the present case. Due to capital limitations, combined marketing efforts and numerous other reasons, retailers are forced to rely on large property developers like the Cafaro Company to build the malls and shopping plazas where the retailers locate their stores.

Typically, retailers operate businesses in only one state or region of the country. Therefore, they are primarily interested in finding a good location to conduct their business within that state or region.

Many of NRF's members are individuals who have invested their life savings in a family business. A lot of these individuals locate their businesses in shopping centers in their hometown. They cannot afford to travel from these hometowns all across the United States to the East Coast where most insurance companies (the largest owners of shopping centers) are located. If the decision of the Ohio Supreme Court is allowed to stand, these individual retailers could be subject to personal jurisdiction of the courts of any state in which their landlords happen to have their offices. This will be true even though these retailers have purposely avoided doing business in that state and even though by contract (the lease), the retailer and the landlord may have agreed that the governing law will be the law of the state where the leased space is located.

## SUMMARY OF THE ARGUMENT

This Court has never squarely addressed the issue present in this case, that is: Whether a state can exercise long-arm jurisdiction over a non-resident lessee based on a single lease contract with a resident lessor when the lessee has no other ties with the lessor or the forum state. This Court's prior opinions on the issue of long-arm jurisdiction suggest that the petitioner's due process rights under the fourteenth amendment are violated if the petitioner is subject to Ohio personal jurisdiction on a single contact.

The petitioner has intentionally not established minimum contacts with Ohio sufficient to expect being haled into court there. The petitioner had only a single contact with a resident of Ohio and, prior to this lawsuit, had never set foot in Ohio. Balancing the particular facts of this case with the interests of the parties and the states involved, to subject the petitioner to long-arm jurisdiction in the Ohio courts would not comport with traditional notions of fair play and substantial justice.

## ARGUMENT

### I. This Court has never addressed the issue involved in this case; that is, whether a state can exercise long-arm jurisdiction over a non-resident defendant based solely on a single lease agreement with a resident of the forum state when the nonresident defendant had no other contacts with the plaintiff or the forum state.

One of the major goals of the due process clause will be severely undermined if the decision of the Ohio Supreme Court is allowed to stand. In *World-Wide Volkswagen Corp. v. Woodson*, this Court stated that "[t]he Due Process Clause, by ensuring the 'orderly administration of the laws,' gives a degree of predictability to the legal system that allows potential defendants to structure the primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit." 440 U.S. 286, 297 (1980)

(citation omitted) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)).

The petitioner in the present case has attempted to structure its conduct in such a way that it would be able to defend and prosecute in the courts of Kentucky. It chose to operate a retail business in Kentucky. It picked out what it thought was the best location in Paducah, Kentucky to run its business. It entered into a lease agreement which is governed by the laws of Kentucky. It could not help the fact that its landlord had decided to set up its offices in Ohio. Yet despite all this effort by the petitioner to avoid being sued in Ohio, and despite the fact that petitioner had no contacts with Ohio other than the one lease agreement, the Ohio Supreme Court decided that the Ohio courts had jurisdiction over the petitioner. Because one goal of the due process clause is to allow individuals to be able to predict with some assurance where they are subject to being sued, the decision of the Ohio Supreme Court must be reversed.

Dissenting from the denial of certiorari in *Lakeside Bridge & Steel Co. v. Mountain State Construction Co., Inc.*, Justice White voiced the following concern:

> [T]he question of personal jurisdiction over a nonresident corporate defendant based on contractual dealings with a resident plaintiff has deeply divided the federal and state courts. . . . [The disarray among the courts] may well have a disruptive effect on the commercial relations in which certainty of result is a prime objective. That disarray also strongly suggests that prior decisions of this Court offer no clear guidance on the question.

445 U.S. 907, 909-911 (1980). Since then, this Court has decided the case of *Burger King Corp. v. Rudzewics*, 471 U.S. 462 (1985), which only partially answered whether personal jurisdiction over a nonresident corporate defendant can be had based on contractual dealings with a resident plaintiff. In *Burger King*, the defendant, a Michigan resident, was a franchisee operating a restaurant in Michigan under a franchise agreement with the plaintiff, Burger King Corporation, a Florida resident. Burger King sued its franchisee

in Florida for breach of the franchise agreement. This Court held that Florida courts could properly exercise personal jurisdiction over the franchisee. However, *Burger King* is distinguishable from the present case on several very important grounds.

First, the opinion in *Burger King* states that "[t]he Due Process Clause protects an individual's liberty interest in not being subject to the binding judgments of a *forum* with which he has established no meaningful 'contacts, ties, or relations.' " 471 U.S. at 471-2 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)) (emphasis added). The United States Court of Appeals for the Eighth Circuit addressed this point when it stated that "[t]o assess compliance with due process, with respect to jurisdiction in a particular case, the minimum contracts relied upon must be *between the defendant and the forum state, not simply between the defendant and a resident of the forum state.*" *Aaron Ferer & Sons Co. v. American Compressed Steel Co.*, 564 F.2d 1206, 1211 (8th Cir. 1977) (emphasis added). In *Burger King*, the franchisee had invoked the privileges and benefits of Florida law by entering into a franchise agreement which provided that it was to be governed by the laws of Florida. 471 U.S. at 481. In the present case, the lease provides that the laws of Kentucky govern any conflicts between the petitioner and respondent.

Second, in *Burger King*, the defendant and the plaintiff entered a "franchise relationship" in Florida. 471 U.S. at 466. Paragraph 37 of the lease agreement in the present case explicitly states that the only relationship between the petitioner and the respondent is that of landlord and tenant. See, Petition for Writ of Certiorari, p. 70a. This distinction is important because it evidences the vast difference in the relationship of the parties in the two cases.

Third, the franchisee in *Burger King* had a very substantial relationship with the Florida plaintiff. The franchisee derived a great business benefit from its relationship with the plaintiff. The franchisee's store displayed the Burger King name and logo. All of the food offered was Burger King food. The franchisee's packaging bore

the Burger King name and logo. The franchisee's business was dependent on its affiliation with Burger King. 471 U.S. at 464-5.

In the present case, there is no such dependency relationship. The petitioner could have entered a lease agreement with any other landlord and still operated the same business, but at a different location. The petitioner uses its own business name, not that of the respondent. In fact, most shoppers at Kentucky Oaks Mall have no idea (nor care) who owns the mall. The petitioner's business is due to its own good name and the names of other mall tenants acting as a draw to mall patrons.

Fourth, in *Burger King*, this Court stated that where a state seeks personal jurisdiction over a nonresident defendant,

> it is essential . . . that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State. . . . This 'purposeful availment' requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of '*random*,' '*fortuitous*,' or '*attentuated*' contracts. . . .

471 U.S. at 475 (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958) and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)) (emphasis added).

Petitioner had no more than a *random, fortuitous* or *attenuated* contact with the state of Ohio. The only reason the petitioner had any contact with Ohio was that the respondent happened to have its office in Ohio. The petitioner did not conduct activities in Ohio; its activities were limited to Kentucky or Georgia.

Fifth, in *Burger King*, this Court stated that "[i]f the question is whether an individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's forum, *we believe the answer clearly is that it cannot.*" 471 U.S. at 478 (emphasis partially added). If the only contact involved is one contract, the Court must consider the terms of that contract along with prior negotiations between the parties and the contemplated future consequences. *Id.* at 479.

In *Burger King*, the prior negotiations as well as the contemplated future consequences of the contract involved a much closer relationship between the parties than was involved here. The negotiations between the parties in *Burger King* lasted four months after which they entered a "franchise relationship." 471 U.S. at 466. The future consequences contemplated by the franchise agreement involved regulation and oversight of the franchisee's restaurant by the franchisor. *Id.* 464-5.

In the present case, the negotiations concerned a store lease in Kentucky and future consequences concerned payment of rent and occupancy of space. There was no regulation and oversight or product name usage as was the case in *Burger King*. The petitioner's only contact envisioned by the lease was prompt payment of rent and other occupancy charges.

Because *Burger King* does not answer the question whether one contract between a nonresident lessee and a resident lessor is sufficient to subject the nonresident lessee to the personal jurisdiction of the lessor's state, and because of the heavy impact this case will have on retail merchants as commercial lessees, this Court should review and reverse the decision of the Ohio Supreme Court.

## II. The exercise of personal jurisdiction over a nonresident defendant based on a single contact with a resident of the forum state violates that defendant's fourteenth amendment right to due process of law.

This Court has established a two-part test to determine whether the exercise of personal jurisdiction over a nonresident defendant violates the due process clause of the fourteenth amendment. In *Burger King Corp. v. Rudzewicz*, this Court stated that "[o]nce it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.' " 471 U.S. 462, 476 (1985) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 320 (1945)).

### A. The Petitioner has not purposefully established minimum contacts with the forum state sufficient to expect to be haled into court there.

Under the first part of the two-part test set out in *Burger King*, a defendant must have sufficient minimum contacts with the forum state that the defendant "should reasonably anticipate being haled into court there." 471 U.S. at 474. Retail merchants, such as the petitioner in the present case, do not anticipate being haled into court in Ohio when they enter into an agreement to lease a shop in Kentucky, when the laws of Kentucky govern the contract, and when the retailers have no stores and conduct no business in Ohio and have never even been to Ohio. The mere fact that the landlord has its office in Ohio and the tenant, as required by the lease, sends rent checks to Ohio does not give rise to an anticipation by the tenant that it will be forced to go to Ohio to be sued in a dispute about the lease of the Kentucky store.

The Ohio Supreme Court relied heavily on this Court's holding in *Burger King, supra*, to hold that the petitioner had purposefully established minimum contacts sufficient to withstand due process scrutiny. As discussed above, the facts of that case are substantially distinct from the present case.

Several United States Circuit Courts of Appeal have held that no personal jurisdiction exists over a nonresident defendant when the only contact the defendant had with the forum state was one contract.

In *Colonial Leasing Co. of New England, Inc. v. Pugh Brothers Garage*, 735 F.2d 380 (9th Cir. 1984), the defendants owned an automobile repair shop in Georgia. The plaintiff, an Oregon corporation, leased a pipe bending machine to the defendants. The machine was delivered to the defendants from a third party in New York whom the defendants had initially contacted to inquire about leasing the machine. The plaintiff mailed the lease contract to the defendants who signed it and mailed it back to the plaintiff in Oregon. The defendants also mailed several rent checks to the plaintiff in Oregon. When the defendants breached the lease agreement, the plaintiff sued the defendants in Oregon. The Ninth Circuit Court

of Appeals, with Justice Kennedy, then a circuit court judge, sitting, affirmed the District Court's dismissal of the case for lack of personal jurisdiction. The court noted that "[t]he contacts with Oregon were no more than that each of the defendants in his home state signed a contract with a corporation doing business in Oregon and sent some monthly payments to that corporation in Oregon." *Id.* at 383. The court held that "on these facts [plaintiff's] assertion of jurisdiction over the defendants cannot be supported." *Id.*

The significant facts of *Colonial Leasing* are strikingly similar to the facts of the present case. Each case involves a defendant executing a contract with and mailing rent payments to a plaintiff in a different state. The amount and type of contacts each defendant had with the forum state are exactly the same. Therefore, the holding of *Colonial Leasing* persuasively suggests that the exercise of personal jurisdiction by the Ohio courts in the present case violates the petitioner's fourteenth amendment right to due process of law.

The decision of the Ohio Supreme Court contradicts *Colonial Leasing*. This Court should clear up this disparity by reversing the decision of the Ohio Supreme Court in light of *Colonial Leasing* and other cases reviewed herein.

In *Iowa Elec. Light & Power Co. v. Atlas Corp.*, 603 F.2d 1301 (8th Cir. 1979), the plaintiff, an Iowa company, sued the defendant, a Delaware corporation with its principal place of business in New Jersey. The plaintiff alleged the defendant breached a contract whereby it was to sell uranium ore to the plaintiff for a period of years. The defendant had no agents, employees, or offices in Iowa. Under the contract, the defendant was to deliver the ore to the plaintiff in Illinois. The court held that the plaintiff could not obtain personal jurisdiction over the defendant in Iowa because the defendant did not have the requisite minimum contacts with Iowa. In arriving at this holding, the court stated that "*[m]erely entering into a contract with a forum resident does not provide the requisite contacts between a defendant and the forum state.*" *Id.* at 1303 (emphasis added).

In *Arthur, Ross & Peters v. Housing, Inc.*, 508 F.2d 562 (5th Cir. 1975), a North Carolina defendant entered into one contract

with the Texas plaintiff, under which contract the defendant was to purchase and develop land in North Carolina, a limited partnership with the plaintiff and then transfer title to the land to the limited partnership. The court held that the defendant did not have the required minimum contacts with the forum state.

In *Galgay v. Bulletin Company, Inc.*, 504 F.2d 1062 (2d Cir. 1974), the plaintiff, a trustee in reorganization for Hoe, a New York machinery manufacturer, sued the defendant, a Pennsylvania corporation, in the New York federal courts for breach of contract. Hoe and the defendant had entered into a contract under which Hoe was to sell machinery to the defendant. All of the negotiations for the contract were done over the telephone or in Pennsylvania. The court held that New York courts did not have personal jurisdiction over the defendant because he did not have minimum contacts with the state of New York.

In *Misco Leasing, Inc. v. Vaughn*, 450 F.2d 257 (10th Cir. 1971), the defendant guaranteed payment under a lease between the plaintiff and a third party. The plaintiff was a resident of Kansas and the defendant and the third party were residents of Oklahoma. Under the lease contract, the third party/lessee was to make payments to the plaintiff/lessor in Kansas. The court held that the defendant had not established minimum contacts with Kansas and, therefore, was not subject to personal jurisdiction of the Kansas courts.

As these cases indicate, the holding of the Ohio Supreme Court in the present case does not follow the holdings of this Court or of the United States Circuit Courts of Appeal on this issue.

1. **A Georgia company does not transact business in Ohio within the meaning of the Ohio long-arm statute when the Georgia company enters into a contract with an Ohio resident to lease a space for retail sales in a Kentucky mall.**

The Ohio Supreme Court based its holding that the petitioner had established minimum contacts with Ohio on its belief that petitioner was transacting business in Ohio. *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.*, 53 Ohio St. 3d 73 (1990). Ohio Revised Code Annotated § 2307.382 (Anderson Supp. 1989) states that "[a] court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's: (1) Transacting any business in this state. . . ." Applying that statute to the present case, the Ohio Supreme Court held that "a commercial nonresident lessee, for purposes of personal jurisdiction, is 'transacting any business' within the plain and common meaning of the phrase, where the lessee negotiates, and through the course of dealing becomes obligated, to make payments to its lessor in Ohio." *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.*, 53 Ohio St. 3d 73, 76 (1990). In reaching this conclusion, the Ohio Supreme Court has established the type of "mechanical" test which this Court expressly rejected in *International Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945) and *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478 (1985).

This mechanical test laid down by the Ohio Supreme Court fails to consider the fact that to a retailer, leasing a shop does not constitute "transacting business." Retailers are in the business of selling or renting goods to the public. When a retailer enters a contract to lease a shop in which to run his business, that contract is only an "intermediate step" on the way to the final goal of operating a retail store. To the retailer, operating the store, not entering into the lease agreement, constitutes "transacting business."

In the present case, the respondent may well consider entering a lease agreement "transacting business." However, the respondent is in the business of developing and leasing property. The fact

is, "transacting business" means different things to different people. To a resident of Paducah, Kentucky who is a mechanic or an accountant or a housewife, renting or buying a tuxedo or formal gown from the petitioner's store does not constitute "transacting business" even though the petitioner would definitely consider that "transacting business." The Ohio Supreme Court apparently ignored this fact when it held that the *petitioner* was "transacting business" in Ohio. The focus of the Ohio long-arm statute is whether the nonresident defendant is "transacting business" in Ohio, not whether the resident plaintiff is doing so. Ohio Rev. Code Ann. § 2307.382 (Anderson Supp. 1989). Yet the Ohio Supreme Court ignored the focus of the Ohio long-arm statute and focused instead on the plaintiff's business and the fact that the defendant was an out of state "customer" of the plaintiff.

**2. To support its decision that "a lease agreement . . . is 'transacting business' within the forum state's long-arm statute," the Ohio Supreme Court relied on cases which involved a far greater amount of activity by the defendant with the forum state than the single contact that occurred in the present case.**

The Ohio Supreme Court stated that "our finding is reinforced by the fact other courts have passed on this issue reaching the same result, to wit: that a lease agreement, in certain circumstances, is "transacting business" within the forum state's long-arm statute." *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.*, 53 Ohio St. 3d 73, 76 (1990). The Court then cited five cases in support of this proposition. *Id.* Each of these five cases is factually distinct from the present case.

In *Wright Int'l Express, Inc. v. Roger Dean Chevrolet, Inc.*, 689 F. Supp. 788 (S.D. Ohio 1988), the defendant, a Florida resident, leased an airplane from the plaintiff, a resident of Ohio. The plaintiff successfully obtained personal jurisdiction over the defendant in the Ohio courts. Like the present case, the defendant in *Wright* never went to Ohio and all negotiations were done over the telephone

or through the mail. However, in that case, the subject of the lease, the airplane, was based in Ohio during the entire term of the lease, the records for the jet were kept in Ohio, and all maintenance on the jet was done in Ohio. In the present case, the subject of the lease is a store which is located in Kentucky.

In *Vena v. Western General Agency, Inc.*, 543 F. Supp. 779 (N.D. Ill. 1982), the defendant, a resident of Arizona, leased an airplane from the plaintiff, an Illinois resident. The court allowed personal jurisdiction over the defendant in the Illinois courts. In *Vena*, the defendant sent an agent to Illinois to negotiate the lease contract and to solicit business for the defendant. The defendant also solicited investors in Illinois. Finally, the lease contract stated that it was governed by Illinois law, thus the defendant invoked the benefits and protection of Illinois law. The petitioner in the present case has never had an agent in Ohio nor solicited any business or investors in Ohio. Furthermore, the law of Ohio does not govern the lease in the present case.

In *Klippel v. Heintz*, 231 Kan. 312, 644 P.2d 428 (1982), a Missouri plaintiff assigned the majority interests in two oil and gas leases to the Illinois defendant. By virtue of this assignment, the defendant knowingly became the majority owner of the two leases which were located in Kansas. These leases created certain duties on the part of the defendant which he had to perform within Kansas. The plaintiff later sued the defendant in Kansas and the court held that the defendant had established minimum contacts with Kansas. By contrast, the petitioner in the present case owns no property in the forum state and the store which is the subject of the lease is located in Kentucky.

In *Schano Transp, Inc. v. Smith*, 312 N.W.2d 114 (Minn. 1981), the plaintiff, a Minnesota resident, leased a truck from the defendant, a resident of Iowa. The plaintiff later sued the defendant in Minnesota for breach of the lease agreement. The truck which the defendant leased to the plaintiff was licensed in Minnesota. The defendant also provided drivers for the plaintiff and these drivers drove in and through Minnesota for the plaintiff. The lease agree-

ment was governed by Minnesota law and the defendant had made business trips to Minnesota. In *Schano Transp.*, the court held that the defendant had established minimum contacts with Minnesota. In the present case, no representatives of the petitioner ever went to or through Ohio on any business matter.

In *S.D. Leasing, Inc. v. Al Spain and Associates*, 277 Ark. 178, 640 S.W.2d 451 (1982), the Arkansas plaintiff sued the Florida defendant for breach of a contract wherein the defendant leased a copying machine from the plaintiff. In *S.D. Leasing*, the defendant never went to Arkansas, the lease was negotiated over the telephone and through the mail, and the defendant mailed rent payments to the plaintiff in Arkansas. However, the lease stated that Arkansas law would govern and that the defendant agreed to subject himself to personal jurisdiction of the Arkansas courts. The petitioner in the present case has not consented to the jurisdiction of the Ohio courts nor do the laws of Ohio govern the dispute between the petitioner and respondent.

In each of the cases cited by the Ohio Supreme Court, the defendant purposely involved himself with the forum state by either obtaining a property interest in real or personal property within the forum state, or invoking the protection and benefits of the laws of the forum state or making personal visits to the forum state. The petitioner in the present case did none of these things. Yet these were the only cases the Ohio Supreme Court cited in support of its proposition that a single lease contract between a nonresident defendant and a resident plaintiff can give rise to personal jurisdiction over the defendant.

Because the Ohio Supreme Court failed to focus on whether the *petitioner* was "transacting business" in Ohio and rather focused on the respondent's business, and because the Court failed to find even one case which supports personal jurisdiction over a nonresident defendant with facts like the ones in the present case, the Ohio Court erred in finding that the Ohio long-arm statute affords personal jurisdiction over the petitioner in this case. However, regardless of whether the language of the Ohio long-arm statute applies

to the petitioner, the petitioner's contacts with Ohio were so insignificant that this Court should hold that petitioner did not establish the minimum contacts required by the due process clause of the fourteenth amendment.

### B. When all of the relevant interests of the parties and states involved in this case are balanced, the Ohio Supreme Court's holding that the Petitioner is subject to personal jurisdiction of the Ohio courts violates traditional notions of fair play and substantial justice.

For the second part of the two-part test set out in *Burger King* this Court has listed five factors which it deems relevant in determining whether assertion of personal jurisdiction over a nonresident defendant comports with fair play and substantial justice. Those are " 'the burden on the defendant,' 'the forum State's interest in adjudicating the dispute,' 'the plaintiff's interest in obtaining convenient and effective relief,' 'the interstate judicial system's interest in obtaining the most efficient resolution of controversies,' and the 'shared interest of the several States in furthering fundamental substantive social policies.' " *Burger King* at 477 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292 (1980).

The Ohio Supreme Court mentions three of these factors in its discussion. First, it points to the fact that the petitioner operates one hundred and one stores throughout the Southeastern United States including Kentucky which borders Ohio. The Court then states that "considering today's modern means of transportation, it is not unreasonable for Mitchell's to defend itself in Ohio." 53 Ohio St. at 78. It is true that the burden on defendant in travelling from Georgia to Ohio is not much greater than travelling from Georgia to Kentucky. However, the store which is the subject of the lease as well as some of the petitioner's employees are located in Paducah, Kentucky, which is over three hundred miles from the Ohio border. These facts make it more of a burden on the petitioner to defend the suit in Ohio than in Kentucky.

The other factors mentioned by the Ohio Supreme Court are the interests of the respondent and the forum state. With regard to these interests the Court states that the "[respondent's] and the forum state's interest in adjudicating the dispute is strong." *Id.* The Court never elaborates on the respondent's "strong" interest, it simply states that respondent has a strong interest. According to this Court, the relevant interest of the respondent is its interest in "obtaining convenient and effective relief. . . ." *Burger King* at 477. However, since the respondent owns a mall in Kentucky, and since the dispute in this case concerns a lease of one of the stores in that mall, and since the laws of Kentucky govern that lease and the underlying dispute in this case, the state wherein the most convenient and effective relief can be had by any party would be Kentucky. Significantly, a case on the same issues raised by the respondent in the present case is currently pending in Kentucky.

With regard to the forum state's interest in adjudicating the dispute, the Ohio Supreme Court said that the Ohio long-arm statute was intended to provide a forum for Ohio residents. However, the respondent can easily obtain a forum for his dispute in Kentucky where he owns and runs his mall. The Ohio Supreme Court also stated that "Ohio has an interest in resolving suits brought by its residents and has a substantial interest in seeing that its residents get the benefit of their bargains." *Kentucky Oaks Mall Co. v. Mitchell's Formal Wear, Inc.*, 53 Ohio St. 3d 73, 76 (1990) (quoting *Wright Int'l Express, Inc. v. Roger Dean Chevrolet, Inc.*, 689 F. Supp. 788, 791 (S.D. Ohio 1988). None of these interests will be better served by maintaining the lawsuit in Ohio rather than in Kentucky.

Furthermore, the interest of the interstate judicial system in obtaining the most efficient resolution of this controversy and the interests of the several states in furthering fundamental substantive social policies would both be better served if this dispute is resolved in the courts of Kentucky. The dispute involves the lease of a store in Kentucky, the law of Kentucky governs the dispute, and both parties have availed themselves of the privileges of conducting business in Kentucky.

Because the petitioner is not transacting business in Ohio and has not established minimum contacts with the state of Ohio, and because a balancing of relevant policy interests favors adjudicating this dispute in Kentucky, the Ohio Supreme Court violated petitioner's due process rights by subjecting it to the personal jurisdiction of the Ohio courts.

## CONCLUSION

For the reasons stated herein, the Petition for a Writ of Certiorari should be granted and the decision of the Supreme Court of Ohio should be reversed.

Respectfully submitted,

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